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No. 10-349

IN THE
Supreme Court of the United States

SHELL OIL COMPANY; SWEPI LP (AS SUCCESSOR-IN-INTEREST TO SHELL WESTERN E & P, INC.),
Petitioners,

v.

NANCY FULLER HEBBLE, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *BMW* v. *Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), this Court held that courts must examine the "disparity" between the punitive damages award and the "actual or potential harm" from the misconduct—calculating "the ratio between punitive and compensatory damages"—to ensure the punitive award is consistent with due process. *State Farm*, 538 U.S. at 418, 425. "When compensatory damages are substantial," the Court stated, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit" of due process. *Id.* at 418. Here, the courts below upheld a punitive damages award of $53,625,000 based on Shell's failure to pay $750,708 in contractual net-profits in connection with an oil-and-gas lease. The jury also awarded about $12.5 million in prejudgment interest, calculated almost entirely at a special 12% rate under a statute that initially denominated such interest a "penalty"; interest at the State's ordinary 6% prejudgment rate would at most have been about $1.5 million. The courts calculated the ratio of punitive to compensatory damages as 4.06-to-1 only by deeming all prejudgment interest at the special 12% rate to be part of the "compensatory" award. The questions presented are:

1. Whether, in calculating the ratio of punitive damages to harm to the plaintiff, heightened penalties such as 12% interest imposed to compel compliance may be treated as "compensatory."

2. Whether, in determining the maximum punitive damages award in a case involving a substantial compensatory award and only economic harm, courts should be guided by the 1-to-1 ratio mentioned in *State Farm* or instead presume that anything within the range of 4-to-1 is permissible.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Shell Oil Company and SWEPI LP (as successor-in-interest to Shell Western E & P, Inc.) were Defendants/Appellants in the Court of Civil Appeals of the State of Oklahoma and the Supreme Court of Oklahoma.

Nancy Fuller Hebble, Susan Fuller Maley, as Individuals; Nancy Fuller Hebble and Susan Fuller Maley, as Co-Trustees of the Thomas R. Fuller Testamentary Trust; Wachovia Bank, N.A., as Executor of the Estate and Trustee of the Elizabeth Fuller Gardner Trust; and Marshall T. Steves, as Trustee of the Dings Trust Agency, were Plaintiffs/Appellees in the Court of Civil Appeals of the State of Oklahoma and the Supreme Court of Oklahoma.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state that Shell Oil Company is a Delaware corporation and a wholly owned subsidiary of Shell Petroleum, Inc. Shell Petroleum, Inc. is a Delaware corporation, the shares of which are owned directly or indirectly by Shell Petroleum N.V. Shell Petroleum N.V. was founded under the laws of the Netherlands. The shares of Shell Petroleum N.V. are 100% owned by Royal Dutch Shell plc, a publicly traded company.

Petitioners also state that SWEPI LP (successor-in-interest to Shell Western E & P, Inc.) is a Delaware limited partnership and is ultimately wholly owned by Shell Oil Company. SWEPI LP's predecessor, Shell Western E & P, Inc. (Shell Western Energy and Production, Inc.) was organized as a Delaware corporation. On December 29, 1999, it was converted into a Delaware limited partnership, and is now known as SWEPI LP.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Shell Oil Company and SWEPI LP (successor-in-interest to Shell Western E & P, Inc.) (collectively "Shell") respectfully petition for a writ of certiorari to review the judgment of the Oklahoma Court of Civil Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Civil Appeals (App., *infra*, 1a-16a) is reported at __ P.3d __, 2009 WL 6764045 (Okla. Civ. App. Dec. 18, 2009). The orders and judgment of the District Court for Stephens County, Oklahoma (App., *infra*, 17a-30a) are unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Civil Appeals was filed on December 18, 2009 (App., *infra*, 1a), and rehearing was denied on January 26, 2010 (*id.* at 31a). The Oklahoma Supreme Court denied a petition for a writ of certiorari on April 12, 2010, with two Justices dissenting (*id.* at 32a-33a). On July 1, 2010, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including August 10, 2010. On July 30, Justice Sotomayor further extended the time to and including September 9, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides in relevant part:

> No State shall * * * deprive any person of * * * property, without due process of law * * * .

U.S. Const. amend. XIV, § 1.

PRELIMINARY STATEMENT

The decision below upholds a punitive damages award of more than $53 million based on Shell's failure to pay approximately $750,000 in contractual "net profits" from an oil-and-gas lease. That punitive award—the largest upheld in Oklahoma history—is more than 70 times the sum Shell failed to pay. The Oklahoma courts sustained that award under *BMW* v. *Gore*, 517 U.S. 583 (1996), and *State Farm Mutual Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), by deeming $12.5 million in prejudgment interest to be part of the "compensatory" award—even though almost all of that interest was imposed at a special 12% rate under a statute that, as originally enacted, expressly denominated it a "penalty." (By contrast, interest under Oklahoma's ordinary 6% prejudgment rate would at most have been about $1.5 million.) A $750,000 award thus ballooned to a "compensatory" award of more

than $13 million. Comparing the $53.6 million in punitive damages to that $13 million figure, the court of appeals announced that the ratio of punitive to compensatory damages was 4-to-1.

The court of appeals upheld that ratio in two brief paragraphs. The first paragraph quoted one sentence each from *Gore* and *State Farm* to acknowledge that excessive punitive damages awards violate the Constitution. App., *infra*, 15a. The second paragraph devoted 138 words to applying those precedents, upholding the award because it "compares favorably with [the ratio] in *TXO Production Co.* v. *Alliance Resources Corp.*, 509 U.S. 443 [(1993)]." *Id.* at 15a-16a. Of the five factors this Court has identified as relevant to reprehensibility, the court of appeals mentioned only one. And the court did not mention *State Farm*'s observation that, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425.

If the due-process limits on punitive damages identified by this Court are to be the law of the land, the decision below cannot go unreviewed. *Gore* and *State Farm* hold that, in evaluating whether a punitive award is constitutionally permissible, courts must examine the "ratio" between "punitive" and "compensatory" damages. But state and federal courts have fragmented over the recoveries that can be considered "compensatory" as opposed to "punitive," depriving the ratio of its capacity to act as a constitutional check. This Court has also observed that, where compensatory damages are "substantial," a ratio of 1-to-1 may be the due-process limit. But courts have fractured on their construction of that guidance as well, disagreeing on the applicability and relevance of that 1-

to-1 ratio even where compensatory awards are manifestly "substantial."

Those issues are important and recurring. Either defendants are regularly being subjected to unconstitutional punitive damages awards in myriad jurisdictions, or plaintiffs are being erroneously denied the awards authorized by state law in others. In a Nation governed by a single federal Constitution, neither is tolerable. Review is warranted.

STATEMENT

I. BACKGROUND

This case arises out of a series of oil-and-gas agreements. Respondents' predecessors, W.F. Daiber and P.C. Dings, leased oil-and-gas extraction rights from a landowner. Tr. 303-306. In 1927, they executed a "drilling assignment" that transferred the lease to others but reserved for themselves a "net-profits interest." Tr. 306-309; App., *infra*, 2a. Unlike a royalty interest, which represents partial ownership of the underlying minerals, a net-profits interest is a contractual right to a portion of profits from production. U.S. Energy Information Administration Glossary, http://www.eia.doe.gov/glossary/index.cfm?id=N.

The lease, still subject to the net-profits interest, was assigned to Shell in 1948. App., *infra*, 2a. In 1962, the lease was the object of a "unitization" proceeding before the Oklahoma Corporation Commission in connection with one formation; in 1970 and 1972, it was the subject of a drilling-and-spacing order and a private joint-operating agreement covering another. *Id.* at 2a-4a, 6a-7a. The net effect was that respondents, as successors to Daiber and Dings, were entitled to a share of Shell's net profits from certain wells. *Id.* at 4a.

Between August 1973 and December 1985, Shell paid all sums due under the original Daiber/Dings assignment, but failed to pay respondents' share of net profits from two sources—the "Brittain Deese Waterflood Unit" and "Brittain Deep No. 2 Well." App., *infra*, 4a. In December 1985, Shell assigned its interests to Maynard Oil Company, which assumed all responsibility for paying respondents. *Ibid.* The unpaid sums at that point totaled $750,708. *Ibid.*

In 1985, attorneys for one of respondents' predecessors asked Shell about payments. Tr. 730-731. Respondents later claimed that Shell's responses, which were silent as to the Brittain Deep No. 2 well, were misleading. Tr. 1115-1116. Because Shell had sold the oil-and-gas lease to Maynard in 1985, one of respondents' predecessors also wrote to Maynard. Tr. 770-771. Maynard then contacted Shell. Tr. 381-384, 561-562. Shell referred the matter to a division-order analyst who, in 1987, wrote an internal memorandum concluding that the Brittain Deep No. 2 Well was subject to a net-profits interest and that, if net profits were earned, they had not been paid. Tr. 932-935, 945-946. On the same day she wrote that memorandum (but before anyone had acted on it), she sent a letter to Maynard stating that Shell was looking into the matter. Tr. 384-385, 946.

II. PROCEEDINGS BELOW

A. Proceedings In Trial Court

1. Eight years later, in 1995, respondents filed suit in Oklahoma district court. App., *infra*, 4a. They sought actual and punitive damages for breach of fiduciary duty, fraud, and violations of Oklahoma statutes regulating payments on oil-and-gas production, now codified (and collectively referred to as) the Production Revenue Standards Act ("PRSA"), 52 Okla. Stat. §§ 540, 570.10. Ad-

dressing a matter of first impression, the trial court held that Shell had owed respondents a fiduciary duty and rejected Shell's argument that the statute of limitations had run. The limitations period, the court ruled, did not begin to run until (1) Shell "repudiated" its duty, and (2) respondents knew or should have known that Shell had done so. App., *infra*, 4a. The trial court determined that a jury should decide when those events occurred. *Ibid.*

The trial was conducted in two stages. The first concerned Shell's liability for unpaid sums. At trial, Shell did not dispute that respondents had been contractually entitled to net profits. But any contract claim was clearly time-barred. Tr. 289-293. Respondents therefore asserted fraud and breach-of-fiduciary-duty claims. The court of appeals summarized the fraud evidence as follows:

> Shell knew in 1988 it held oil proceeds belonging to Owners. * * * (1) Shell knew Owners did not know about the proceeds, (2) Shell did not tell Owners about the proceeds, (3) Shell knew Owners relied on Shell's operating statements, and (4) Shell intended to keep Owners' proceeds based on its position the statute of limitations had run in 1987, two years after it sold the Crews Lease to Maynard.

App., *infra*, 14a-15a; see also *id.* at 23a-24a (district court's similar description).

Based on that evidence, the jury found Shell liable for breach of fiduciary duty and "false representation, nondisclosure or concealment, deceit, or constructive fraud." App., *infra*, 5a. It awarded a total of $13,205,916 "in actual damages for financial loss and statutory interest thereon." *Id.* at 29a. Of that sum, $750,708 represented the "net profits from 1973 through 1985" that Shell failed

to pay. *Id.* at 4a. The remaining $12,455,208 was prejudgment interest calculated almost entirely at a special 12% rate. Tr. 965-966, 981-983; Pltfs. Exh. 250. While Oklahoma law ordinarily calculates prejudgment interest at a 6% simple rate, 15 Okla. Stat. § 266, the PRSA provides a 12% rate for non-payment of oil-and-gas revenues. 52 Okla. Stat. § 570.10. As originally enacted in 1980, the PRSA expressly denominated that 12% rate a "penalty," 52 Okla. Stat. § 540(B) (1981); that word, however, was deleted in 1985, Okla. Sess. Laws 1985, ch. 141, § 1. In 1989, the PRSA was amended to provide for 12% *compound* interest. Okla. Sess. Laws 1989, ch. 241, § 1.

In the second stage of trial, the jury awarded respondents $53,625,000 in punitive damages. App., *infra*, 2a. The district court entered judgment on May 30, 2008. *Id.* at 27a.

2. The trial court denied Shell's post-trial motions, rejecting Shell's claim that the punitive damages violated due process. App., *infra*, 5a, 17a-26a; see *id.* at 38a-66a (motions and argument). The court briefly addressed the three guideposts this Court set forth in *Gore*, 517 U.S. at 580-583—reprehensibility, the ratio between punitive and compensatory damages, and statutory penalties for comparable conduct. The court stated that "the record supports the jury's finding that Defendants' conduct was very reprehensible." App., *infra*, 23a. The court calculated the ratio of punitive to compensatory damages by counting all $12.5 million in interest as "compensatory," rejecting Shell's claim that the 12% rate was punitive. *Id.* at 24a. The resulting 4.06-to-1 ratio, the court held, is "well within a constitutionally acceptable range." *Id.* at 25a.

B. Proceedings On Appeal

1. Oklahoma's Court of Civil Appeals affirmed. App., *infra*, 1a-16a.[1] Addressing whether Shell owed respondents a fiduciary duty, the court acknowledged the general rule that "oil and gas operators have no fiduciary duty to non-operators arising solely from contracts such as leases, communitization agreements, or joint operating agreements," and that breaches of such agreements ordinarily give rise only to contract claims. *Id.* at 5a-6a. The court held, however, that the general rule does not apply to an operator who manages a "unit organization" established by the Oklahoma Corporation Commission. *Id.* at 6a. The "resort to the police powers of the state" in "unitization proceedings," the court held, gives rise to a fiduciary duty. *Ibid.*

Even so, the court admitted that, for most of the revenue at issue, it was not "clear-cut" that Shell owed a fiduciary duty. App., *infra*, 6a. In particular, for the Brittain Deep No. 2 Well that had generated $715,000 of the $750,000 at issue, Shell became the operator not because the State pooled interests and appointed it; rather, it became the operator "pursuant to a joint operating agreement" among *private* parties. *Id.* at 7a. Ultimately, however, the court held that Shell owed a fiduciary duty to respondents for that well nonetheless. *Ibid.*[2]

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[1] In Oklahoma, civil appeals ("petitions in error") are filed in the Oklahoma Supreme Court, which either reviews them or orders review by the Court of Civil Appeals. In this case, the Oklahoma Supreme Court directed the Court of Civil Appeals to consider the appeal. App., *infra*, 36a.

[2] The court also held that the limitation period had been tolled under Oklahoma's discovery rule, App, *infra*, 8a-9a; upheld the trial court's instruction on the burden of proof, *id.* at 9a-10a; and ruled that Shell had waived its challenge to respondents' proof of reliance, *id.* at 10a.

The court also affirmed the award of prejudgment interest at 12% under the PRSA. App., *infra*, 10a-13a. The court conceded that the PRSA's enhanced interest provisions could be applied only "prospectively." *Id.* at 12a. The court held, however, that Shell must pay 12% interest on all amounts owing as of the PRSA's 1980 enactment, even if those obligations had accrued years before. *Ibid.* The court similarly held that, regardless of the accrual date, all sums outstanding when the PRSA was amended to provide for compound interest in 1989 were subject to compound 12% interest from that date forward. *Ibid.*

Most important here, the court held that all of the prejudgment interest must be considered "part of compensatory damages." App., *infra*, 13a. The court did not dispute that, until October 1985, the PRSA expressly designated 12% interest a "penalty." *Ibid.* But it held that, because the word "penalty" was deleted in 1985, the 12% rate was not a penalty, even as applied to interest accruing between 1980 and 1985—when the PRSA expressly designated the interest a penalty. *Ibid.*

Finally, the court turned to whether the punitive damages were excessive under the U.S. Constitution. App., *infra*, 15a-16a. Notwithstanding its obligation to conduct *de novo* review under *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the court devoted just two paragraphs to rejecting Shell's argument (App., *infra*, 72a-76a, 78a-87a) that the $53.6 million award—more than 70 times the amount Shell erroneously withheld—exceeded constitutional bounds. The first paragraph cited *Gore* for the proposition that a "grossly excessive punitive damage award violates the Fourteenth Amendment." App., *infra*, 15a. It then cited *State Farm* to identify the now-familiar "three guideposts" used to evaluate excessiveness. *Ibid.*

The second paragraph purported to apply those holdings to the facts. In full, it stated:

> In the present case, the reprehensibility of Shell's conduct is heightened by its intentional deceit of the interest owners whose oil proceeds it held for their benefit while it owed a fiduciary duty to those owners arising from its resort to the police powers of the state in unitizing oil and gas interests. The amount of the punitive damage award was slightly more than four times the amount of the actual damages awarded. We do not find this disparity unreasonable. The punitive damage award in this case compares favorably with that in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 [(1993)], where the jury awarded $19,000.00 in actual damages arising from the defendant's baseless claim on plaintiff's oil and gas interests and $10,000,000.00 in punitive damages. Proportionately, Shell has received a much lighter sanction.

App., *infra*, 15a-16a. Rehearing was denied. *Id.* at 31a.

C. Proceedings Before The Oklahoma Supreme Court

Shell sought review in the Oklahoma Supreme Court. Challenging the constitutionality of the punitive damages award, Shell urged that 12% interest under the PRSA "is penal in nature" and "cannot be considered compensatory when evaluating the compensatory-to-punitive ratio." App., *infra*, 102a. Shell also urged that even a 4-to-1 ratio exceeds constitutional bounds, and challenged the court of appeals' failure to perform meaningful *de novo* review, including the failure to address four of the five factors this Court had identified as relevant to reprehensibility. *Id.* at 99a-103a.

The court denied certiorari on April 12, 2010. App., *infra*, 32a. Vice Chief Justice Taylor, joined by Justice Winchester, dissented:

> I would grant certiorari to give a full and meaningful *de novo* review of this punitive damages award under the *State Farm* v. *Campbell*, 538 U.S. 408 (2003), guideposts and factors. That review should also include a complete examination of the issue of due process in the award of these punitive damages.

Id. at 32a-33a. The court later stayed the mandate's effectiveness pending this Court's review. *Id.* at 34a.

REASONS FOR GRANTING THE PETITION

In *BMW* v. *Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), this Court held that excessive punitive damages awards violate due process. To ensure that such awards are "reasonable" and "proportionate," the Court held that reviewing courts must examine (among other things) the "disparity" between the amount of the punitive award and the "actual or potential harm" from the misconduct. *State Farm*, 538 U.S. at 418. "When compensatory damages are substantial," the Court observed, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425; see *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2634 n.28 (2008) (where recovery is "substantial," the "constitutional outer limit may well be 1:1").

The decision below upheld a $53 million punitive damages award that is *more than 70 times* the $750,708 that Shell failed to pay. The Oklahoma courts sustained that breathtaking award by ruling that $12.5 million of interest imposed almost exclusively at 12%—under a statute that initially denominated such interest a "penalty"—should be considered part of the "compensatory" award.

(Under Oklahoma's ordinary prejudgment rate, by contrast, interest would at most have been about $1.5 million.) By shifting millions in penalty interest to the compensatory side of the ledger, the court transformed a clearly improper double-digit punitive-to-compensatory ratio into a putatively more presentable 4.06-to-1 ratio. It then sustained that ratio by asserting that this Court had upheld a higher one in *TXO Production Co.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993)—a pre-*Gore* case involving small compensatory damages ($19,000) and enormous potential harm.

The decision below raises two questions warranting this Court's review. First, the ratio of punitive to compensatory damages this Court identified in *Gore* and *State Farm* can provide a meaningful check on disproportionate punitive awards only if courts apply consistent standards to distinguish between punitive sums (that belong in the numerator) and compensatory awards (that belong in the denominator). As this case illustrates, deeming a portion of an award "compensatory" can mean the difference between an obviously excessive double-digit ratio and one that is potentially permissible. Yet lower courts have fragmented on how to determine whether an award is compensatory for due-process purposes.

Second, while this Court has "decline[d] to impose a bright-line ratio which a punitive damages award cannot exceed," it has held that the permissible ratio depends on whether compensatory damages are "substantial." *State Farm*, 538 U.S. at 425. Relatively higher ratios "may comport with due process where 'a particularly egregious act has resulted only in a small amount of economic damages.'" *Ibid.* But "substantial" compensatory awards require "a lesser ratio, perhaps only equal to compensa-

tory damages." *Ibid.* Courts, however, have divided on the meaning of that guidance.

I. THE COURT SHOULD GRANT REVIEW TO ESTABLISH THE CRITERIA FOR DETERMINING WHETHER AN AWARD IS "COMPENSATORY" FOR DUE-PROCESS PURPOSES

In evaluating the constitutionality of punitive damages awards, courts must examine the "disparity between the actual or potential harm suffered by the plaintiff" on the one hand "and the punitive damages award" on the other. *State Farm*, 538 U.S. at 418, 424-425; *Gore*, 517 U.S. at 580-583. The ratio between the punitive award and the harm to the plaintiff, together with evaluation of the conduct's reprehensibility and comparable statutory penalties, ensures the "reasonable[ness]" and "proportion[ality]" the Constitution requires. *State Farm*, 538 U.S. at 426. The ratio, however, is wholly dependent on whether particular relief is categorized as "compensatory" or "punitive." Here, the court of appeals ruled that $12.5 million in prejudgment interest, mostly calculated at a special *12%* rate, should be treated as "compensatory" even though 12% is twice Oklahoma's ordinary prejudgment rate and was imposed under a statute that originally designated it a "penalty." Simply placing the "compensatory" label on an award that is functionally punitive defeats the "reasonableness" and "proportionality" that due process requires. To prevent such results and restore uniformity, review should be granted.

A. The Courts Are Divided On What Constitutes A Compensatory Award

In *State Farm*, this Court held that courts must examine the "ratio between harm, or potential harm, to the plaintiff and the punitive damages award." 538 U.S. at 424; see *Gore*, 517 U.S. at 580. The "harm inflicted on the

plaintiff" often will equal the award of compensatory damages. See *Gore*, 517 U.S. at 580. But sometimes an award formally labeled "compensatory" is "based on a component which was duplicated in the punitive award." *State Farm*, 538 U.S. at 426. Due-process protections must apply in that situation as well: To allow litigants, courts, or legislatures to evade constitutional requirements by slapping the "compensatory" label on recoveries that are obviously punitive would render this Court's "restraints on jury excess" just "as fickle as the process [they were] designed to superintend." *TXO*, 509 U.S. at 467 (Kennedy, J., concurring). Courts, however, are divided on how to determine whether a particular recovery is compensatory.

1. In this case, no one disputes that the award of $750,708—the amount Shell failed to pay respondents—is compensatory. Comparing that figure to the $53 million in punitive damages produces a ratio of more than 70-to-1. That is precisely the sort of award "exceeding a single-digit ratio" that, under this Court's decisions, almost always violates due process. *State Farm*, 538 U.S. at 425.

The Oklahoma courts, however, deemed 30 years of interest at a 12% rate—under a statute initially designating such interest a "penalty"—to be "compensatory." App., *infra*, 2a, 15a. Adding the $12.5 million in interest to the original $750,000 award produced a "compensatory" award of over $13 million and a ratio approximating 4-to-1. *Id.* at 15a. The 12% rate imposed here is twice the "'standard,' nonpunitive" prejudgment rate of 6% simple interest Oklahoma ordinarily uses "to compensate for the use of money." *Tulsa Energy* v. *KPL Prod. Co.*, 111 F.3d 88, 91 (10th Cir. 1997); 15 Okla. Stat. § 266. Had interest at Oklahoma's "'standard,' nonpunitive" 6% rate been awarded instead, total interest would at most have

been about $1.5 million—a fraction of the $12.5 million awarded.[3]

In placing the entire $12.5 million interest award on the "compensatory" side of the ledger, the decision below did not ask whether imposing compound interest at double the ordinary rate serves as "compensation" in any traditional sense. Instead, it relied on the legislature's label. The court conceded that, before the PRSA was amended in 1985, it expressly denominated the 12% rate a "penalty": Covered defendants, the PRSA declared, "shall be liable to the persons legally entitled to the proceeds from production for the unpaid amount * * * with interest thereon at the rate of twelve percent (12%) per annum, *as the penalty*." 52 Okla. Stat. § 540(B) (1981) (emphasis added). But the court of appeals held that the PRSA's 12% rate is compensatory rather than punitive because a 1985 amendment replaced the phrase "as the penalty" with the clause "calculated from the date of first sale." Okla. Sess. Laws 1985, ch. 141, § 1; App., *infra*, 13a (citing *Purcell* v. *Santa Fe Minerals, Inc.*, 961 P.2d 188 (Okla. 1998)). The court then applied that conclusion even to interest that accrued between 1980 and 1985—when the statute *did* denominate 12% interest a "penalty"—and to interest on that penalty interest until judgment.

The impact of that ruling could not be more stark. Of the $13.3 million the Oklahoma courts deemed "compensatory," more than 90% was interest, and nearly 90% was attributable to the special 12% rate. If the statutory award of double-ordinary-interest were categorized as

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[3] Even if one assumes that all $750,708 in unpaid net profits accrued in 1973 rather than throughout the 12-year period between 1973 and 1985, the ordinary 6% rate would have generated $45,042.48 in annual interest—$1,531,444 over 34 years.

punitive, the ratio of punitive to compensatory damages would be approximately 87-to-1. Excluding penalty interest from the calculation entirely yields a ratio exceeding 70-to-1. And even if one includes prejudgment interest at Oklahoma's "'standard,' nonpunitive" 6% rate in the compensatory award, *Tulsa Energy*, 111 F.3d at 91, the ratio is still well above 20-to-1. Only by treating the entire 12% interest award as compensatory could the courts below avoid exceeding the "single-digit ratio" beyond which awards rarely "satisfy due process," *State Farm*, 538 U.S. at 425:

Punitive damages + 12% penalty interest ($64,548,764)	Sum withheld ($750,708)	86.9:1
Punitive damages only ($53,625,000)	Sum withheld ($750,708)	71.4:1
Punitive damages + 12% penalty interest ($64,548,764)	Sum withheld + interest at standard rate ($2,283,152)	28.2:1
Punitive damages only ($53,625,000)	Sum withheld + interest at standard rate ($2,283,152)	23.4:1
Punitive damages only ($53,625,000)	Sum withheld + 12% penalty interest ($13,205,916)	4.06:1

2. The decision below implicates a wide-ranging conflict. Like the decision below, many courts make the legislature's "compensatory" label dispositive. For example, in *Modern Management Co.* v. *Wilson*, 997 A.2d 37 (D.C. 2010), the District of Columbia's highest court held that a treble damages award (which necessarily exceeds "the actual harm suffered") should be considered compensatory. The court "compare[d] the treble figure to the pu-

nitive award," not because the treble figure reflected the plaintiff's actual injury, but rather "because the treble figure reflects the legislature's desire to ensure 'full compensation.'" *Id.* at 57.

The Third Circuit and Illinois courts have held that an award of attorney's fees goes "on the compensatory side" of the ratio because the legislative "purpose" is "to ensure that plaintiffs could secure counsel." *Blount* v. *Stroud*, 915 N.E.2d 925, 944-945 (Ill. Ct. App. 2009), pet'n for cert. filed, No. 09-1572 (U.S. June 25, 2010). Thus, in *Willow Inn, Inc.* v. *Public Service Mutual Insurance Co.*, 399 F.3d 224 (3d Cir. 2005), the court agreed that *Gore* requires courts to examine "the actual harm inflicted" on the plaintiff, and conceded that it was a "stretch" to say the defendant had "inflicted" attorney's fees and court costs. *Id.* at 236. But the court held that fees and costs are nonetheless a "proper term to compare to the punitive damages award for ratio purposes" because the State's fee-shifting statute had a purpose of enabling plaintiffs to bring actions and "to secure counsel on a contingency fee." *Id.* at 235, 236; see also *Jurinko* v. *Med. Protective Co.*, 305 F. App'x 13, 28 n.16 (3d Cir. 2008) ("In calculating this ratio, we include attorney's fees and costs as part of compensatory damages."). Following *Willow Inn*, *Blount* similarly treated a million-dollar fee award that was many times actual damages as compensatory, reducing the ratio from 10-to-1 to less than 2-to-1. 915 N.E.2d at 943-946.

Other courts, by contrast, look to the *function served* by the recovery—whether it provides money to compensate for the harm imposed or instead "includes a punitive element that is duplicated in the punitive damages award." *Bridgeport Music, Inc.* v. *Justin Combs Publ'g*, 507 F.3d 470, 489 (6th Cir. 2007). As this Court has explained, compensatory awards "redress the concrete loss

that the plaintiff suffered by reason of the defendant's wrongful conduct." *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). In other words, compensatory damages provide a recovery that "'will compensate the injured party for the injury sustained, *and nothing more*.'" *McMillian* v. *FDIC*, 81 F.3d 1041, 1055 (11th Cir. 1996) (quoting *Black's Law Dictionary* 270 (6th ed. abridged 1991) (emphasis added)); accord *Vt. Microsystems, Inc.* v. *Autodesk, Inc.*, 138 F.3d 449, 452 (2d Cir. 1998). Punitive damages, by contrast, do not compensate but provide retribution and deterrence. *State Farm*, 538 U.S. at 416.

Thus, in *Bridgeport*, the Sixth Circuit looked beyond legislative labels to hold that a putatively "compensatory" award making the infringer "liable for the copyright owner's actual damages and the profits of the infringer" included "a punitive element." 507 F.3d at 489. The court ruled that the "actual harm" the plaintiff suffered "[wa]s reflected in the amount * * * lost because of the infringement." *Ibid.* But the disgorgement of profits gained by the infringer, the court held, was punitive: It had the deterrent effect of "prevent[ing] the infringer from unfairly benefiting from a wrongful act." *Ibid.* Comparing the $3.5 million punitive award to the actual loss of approximately $50,000—and not to the larger sum the defendant was forced to disgorge—produced "very high" ratios. *Ibid.*

This Court too has looked beyond legislative labels, holding that a putatively compensatory award for "emotional distress" may embody jury outrage that duplicates a punitive function. *State Farm*, 538 U.S. at 426. Following that decision, many courts have reduced punitive awards where an award for emotional distress has already been made. See, *e.g.*, *Roby* v. *McKesson Corp.*, 219

P.3d 749, 768-769 (Cal. 2009); *Tony Gullo Motors I, L.P.* v. *Chapa*, 212 S.W.3d 299, 308-310 (Tex. 2006).

3. The approach adopted in cases like this one and *Wilson* cannot be reconciled with this Court's cases, settled understandings, or common sense. *State Farm* and *Gore* make clear that courts must look to the "harm" to the plaintiff. Here, there can be no claim that 12% interest compensates for such a harm or represents the lost time-value of money. To the contrary, 12% is double Oklahoma's 6% "'standard,' nonpunitive rate of interest," which *is* designed "to compensate for the use of money." *Tulsa Energy*, 111 F.3d at 91; see *Sec'y of Admin. & Fin.* v. *Labor Relations Comm.*, 749 N.E.2d 137, 142 (Mass. 2001) ("flat twelve percent" interest "significantly above-market"). It does not simply provide money to substitute for the injury sustained "and no more." The Oklahoma Supreme Court has recognized that 12% interest functions as a penalty—it is "*not* merely compensation for the use of money belonging to another," but instead "interest *qua penalty* to compel compliance" with payment requirements. *Fleet* v. *Sanguine, Ltd.*, 854 P.2d 892, 899-900 (Okla. 1993) (some emphasis added).[4]

It is true that, when the Oklahoma legislature amended the PRSA in 1985, it eliminated the word "penalty" from the statute. But that amendment in no way altered the *function* of 12% interest. The only substantive change in Oklahoma's statute occurred in 1989, when the penalty was increased to provide 12% *compound* inter-

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[4] Notably, the PRSA exempts defendants who *justifiably* withhold payment based on a legitimate dispute over title. Such defendants pay only the "'standard,' nonpunitive rate" of "six percent" simple interest—the amount needed to *compensate*, but not the higher amount which *punishes*. *Tulsa Energy*, 111 F.3d at 91; see *Hull* v. *Sun Ref. & Mktg. Co.*, 789 P.2d 1272, 1276-1277 (Okla. 1990).

est. App., *infra*, 12a; 1989 Okla. Laws, ch. 241, § 1. That made the penalty *more* punitive, not less.[5]

Whether a recovery is compensatory or punitive for due-process purposes is a federal question. For federal purposes, penalties should be uniformly treated as penalties regardless of the label the State chooses to attach (or remove). In the criminal context, for example, every fact necessary to authorize a higher sentence is considered an element of the offense that must be found by a jury beyond a reasonable doubt, "no matter how the State labels it." *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002). "[W]hether the [state] statute calls them elements of the offense, sentencing factors, or Mary Jane," the Constitution treats them the same. *Id.* at 610 (Scalia, J., concurring). The Takings Clause likewise cannot be avoided simply by declaring a landowner's otherwise established property rights to be something other than "property." For the same reasons, the legislature's deletion of the word "penalty" from the statute here, without changing the statute's substance, should not alter the award's characterization for due-process purposes. Cf. *Ala. Dep't of Conservation & Natural Res.* v. *Exxon Mobil Corp.*, 11 So. 3d 194, 200-201 (Ala. 2008) (legislature's deletion of the word "penalty" from bill's title is irrelevant to whether heightened interest rate under Alabama's oil-and-gas payment statute is "penal in nature").

A contrary rule would yield absurd results. Under it, States that limit plaintiffs to traditional compensation

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[5] Indeed, the common law generally disallowed compounding "because of its harsh and oppressive character." Hale, *Handbook on the Law of Damages* 172 (1896). As an "exception to the general rule * * * compound interest [wa]s sometimes inflicted by way of punishment." Sedgwick, *A Treatise on the Measure of Damages* 404 (3d rev. ed. 1858).

would face stricter limits on punitive damages. But States that depart from traditional limits—imposing increasingly harsh remedies such as double damages or double interest awards—would be constitutionally permitted to impose proportionately higher punitive damages awards as well, even where the underlying "harm" is the same. This case exemplifies that absurdity. If interest had been limited to the ordinary, nonpunitive 6% rate, the "compensatory" award here would have been no greater than $2.3 million, and the $53 million punitive award—a ratio exceeding 20-to-1—would have been clearly impermissible. But the courts below ruled that Oklahoma's imposition of the extreme sanction of 12% compound interest, by reducing the ratio to 4-to-1, made it constitutionally permissible to impose an even more extreme $53 million punitive damages award.

Of course, States have a legitimate interest in imposing penalties to compel compliance. For example, "to assure prompt and full payment of economic claims," New York provides a heightened "interest rate [that] is designed to inflict an economic sanction or penalty on those insurers who do not comply. Said differently, the statute and regulation are punitive, with severe penalties, to encourage prompt adjustments of claims." *Cardinell* v. *Allstate Ins. Co.*, 302 A.D.2d 772, 774 (N.Y. App. Div. 2007) (addressing N.Y. Ins. Law § 5106(a)) (citations and quotation marks omitted). Likewise, federal law has punitive prompt-payment provisions.[6] But such statutes

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[6] The federal prompt-payment statute establishes an "interest penalty" government agencies owe late-paid contractors. 31 U.S.C. § 3902. Rather than compensating for the time-value of money, such interest deters bad behavior by providing "incentives for the Federal Government to pay its bills on time.'" *Inversa, S.A.* v. *United States*, 73 Fed. Cl. 245, 248 (2006). That penalty rate, however, is currently less than 4%. 75 Fed. Reg. 37,881.

achieve "deterrence and retribution," not compensation. *State Farm*, 538 U.S. at 416; see *Sterilite Corp.* v. *Cont'l Cas. Co.*, 494 N.E.2d 1008, 1011 (Mass. 1986) ("prejudgment interest" at excessive rate "could result in a windfall for plaintiffs amounting, in essence, to an award of punitive damages"). Because such statutes go beyond compensating plaintiffs and instead punish defendants, they are punitive, not compensatory.

B. The Issue Is Important And Recurring

The question raised by this case—which portions of an award count as "compensatory" for due-process purposes—is important and recurring. Whenever courts examine a punitive damages award, "the question becomes: What figure comprises the second term of the ratio to compare to the * * * punitive damages award? There is no shortage of candidates." *Willow Inn*, 399 F.3d at 234. Courts repeatedly confront "attempts to alter the ratio" by including or excluding recoveries for attorney's fees, prejudgment interest, and statutory penalties. *Amerigraphics, Inc.* v. *Mercury Cas. Co.*, 107 Cal. Rptr. 3d 307, 329 (Cal. Ct. App. 2010).

The issue has divided courts in a variety of contexts. Courts have disagreed over whether statutory treble damages awards should be considered compensatory or punitive. Some courts count treble damages as "compensatory." See pp. 16-17, *supra* (discussing *Wilson*, 997 A.2d at 57). But others hold that "[t]reble damages are a *form* of punitive damages" and thus *substitute* for jury-imposed multipliers. See *Perez* v. *Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 621, 624 (7th Cir. 2000) (Easterbrook, J.). Courts similarly disagree over the proper treatment of attorney's fees. Many hold that such awards "should be counted on the compensatory side of the *Gore* ratio." See p. 17, *supra* (citing cases). But others have held that, because fee awards "'includ[e] a certain punitive ele-

ment,'" they "favor[] a lesser rather than greater award." *Daka, Inc.* v. *McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003); see also *Parrish* v. *Sollecito*, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003); *Wallace* v. *DTG Operations, Inc.*, 563 F.3d 357 (8th Cir. 2009) (substantial attorney's fees not included as actual damages).

Courts likewise diverge on the proper treatment of disgorged profits. In *Bridgeport*, the Sixth Circuit concluded that disgorgement is punitive. See p. 18, *supra*. But the Federal Circuit has held otherwise. When a jury awarded $1 in nominal damages for actual losses and *$15 million* for unjust enrichment, the court affirmed a *$50 million* punitive damages award based on its conclusion that all $15,000,001 was compensatory. *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 272 F.3d 1335 (Fed. Cir. 2001). On remand in light of *State Farm*, see 538 U.S. 974 (2003), the Federal Circuit again treated unjust enrichment as compensation. 345 F.3d 1366, 1369, 1372 (Fed. Cir. 2003). And notwithstanding this Court's conclusion in *State Farm* that putatively "compensatory" awards for mental anguish overlap with punitive damages, see p. 18, *supra*, some courts reject the notion that such awards include punitive components. See *Boyd* v. *Goffoli*, 608 S.E.2d 169, 182-184 (W. Va. 2004)

Courts are even divided on whether to treat ordinary prejudgment interest as compensatory. Some have held that ordinary prejudgment interest compensates for the time-value of money and is therefore compensatory. See *Goddard* v. *Farmers Ins. Co. of Or.*, 179 P.3d 645, 667 (Or. 2008); *Baker* v. *Nat'l State Bank*, 801 A.2d 1158, 1167, 1172 (N.J. Super. Ct. App. Div. 2002). But others disagree, perhaps because it makes little sense to punish stale claims more severely—much less to allow the passage of decades to multiply the punishment under an artificially high compound rate, as happened here. See,

e.g., *JCB, Inc.* v. *Union Planters Bank, NA*, 539 F.3d 862, 869, 876 (8th Cir. 2008); *Amerigraphics*, 107 Cal. Rptr. 3d at 326-329; see also *Bridgeport Music*, 507 F.3d at 484-490 (omitting prejudgment interest without comment); *Peters* v. *Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 803 & n.10, 826 (Va. 2009) (same). And courts have excluded prejudgment interest even where it was far too large to be overlooked as a mere rounding error. See *United Int'l Holdings, Inc.* v. *Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1232-1234 (10th Cir. 2000) (ignoring $28 million in prejudgment interest in ratio calculation); *Burns* v. *Prudential Sec., Inc.*, 857 N.E.2d 621 (Ohio Ct. App. 2006) (ignoring $4 million in prejudgment interest).

In each of those contexts, state and federal courts are vexed by the same fundamental question—how to distinguish the compensatory from the punitive for due-process purposes. And in each context, the answer to that question affects the ratio dramatically. Excluding a sum from the "punitive" numerator reduces the ratio arithmetically. Including that sum in the "compensatory" denominator reduces it geometrically. Such changes can alter the ratio by a factor of 20 or more, often (as here) with multi-million-dollar consequences. See p. 16, *supra*.

Only by granting review can this Court provide the guidance needed to eliminate the disarray. In each context, the basic standard should be the same, without regard to statutory labels. If the recovery represents a historically accepted and currently reasonable estimate of the "concrete loss that the plaintiff suffered by reason of the defendant's wrongful conduct," *Cooper Indus.*, 532 U.S. at 432, providing the plaintiff with the equivalent in money to "make good or replace the loss" and "nothing more," *McMillian*, 81 F.3d at 1055, it is compensatory. Compound interest at double the ordinary rate, multiple

damages awards, and other statutory penalties simply are not.

C. This Case Is An Ideal Vehicle

This case represents an especially good vehicle for addressing the issue. First, the heightened prejudgment interest here was calculated using a concrete figure—12% interest. This case thus would not require evaluation of a subjective jury determination, such as an award for mental anguish, that might or might not contain a punitive element; the figures are definite and their origins statutory. Only the purely legal question of the award's proper treatment under this Court's precedents is in dispute. Second, the impact could not be more obvious. The 12% interest Oklahoma initially imposed as a penalty produced over 90% of what the courts below called "compensatory damages"; only a small fraction of that would have accrued at Oklahoma's ordinary prejudgment rate.

The ratio, moreover, was obviously dispositive in this case. Neither court below suggested it would have upheld a ratio exceeding 4-to-1, let alone a double-digit ratio far exceeding 20-to-1. And if ever there were a case that warranted a low ratio, this is it. Shell does not dispute that it failed to pay $750,000 in contractual net profits it owed respondents. But, of the five factors this Court considers in evaluating the critical due-process guidepost of reprehensibility, *four* weighed against a substantial award: There was no risk of "physical as opposed to economic" harm; no "disregard of the health and safety of others"; no "target[ing]" of the "financial[ly] vulnerab[le]"; and no recidivism. *State Farm*, 538 U.S. at 419.

The courts below identified only one factor, "deceit," to support the claim that Shell's conduct showed "heightened" reprehensibility. App., *infra*, 15a. But deceit is present in *every* fraud case. And the only evidence of

fraud invoked by the courts to sustain the verdict below was that, more than two years after Shell sold its interests in the oil-and-gas leases, it became aware that it had erroneously failed to pay respondents; knew respondents were unaware of that error; knew its prior statements to them were in error; but nonetheless chose "to keep [respondents'] proceeds based on its position the statute of limitations had run." App., *infra*, 14a-15a, 23a-24a; p. 6, *supra*. The deceit relied on here thus amounts to keeping sums obtained because of an earlier accounting error and later asserting an unsuccessful statute-of-limitations defense. That conduct may warrant disapproval. It does not, however, amount to a particularly aggravated fraud. It is inconceivable that this case would have come out the same way if the courts below had properly understood the ratio to be not 4.06-to-1 but 23-to-1, 70-to-1, or more. See, *e.g.*, *Bridgeport Music*, 507 F.3d at 486, 487 ("In this case where only one of the reprehensibility factors is present"—"deceit"—a "ratio in the range of 1:1 to 2:1 is all that due process will allow.").

II. The Courts Are In Conflict About Whether *State Farm* Imposes A 1-to-1 Benchmark When Compensatory Damages Are "Substantial"

This case implicates a second important issue dividing the courts, even assuming the ratio here to be 4.06-to-1. In *State Farm*, this Court observed that, "[w]hen compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.*" 538 U.S. at 425 (emphasis added); see also *Exxon Shipping*, 128 S. Ct. at 2626, 2634 n.28 (if compensation is "substantial," the "constitutional outer limit may well be 1:1"). Since *State Farm*, however, courts have reached dramatically divergent conclusions on the meaning of that guidance.

A. The Courts Are Squarely Divided

1. Case after case has read *State Farm* to establish the 1-to-1 benchmark as the presumptive constitutional norm where compensatory damages are substantial. For example, in *Bridgeport Music*, the Sixth Circuit announced that the "Supreme Court *has made clear* that '[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" 507 F.3d at 488 (emphasis added). The court therefore ruled that the ratio before it, 3.5-to-1 on compensatory damages of $366,939, was "excessive." *Id.* at 489. "In this case where only one of the reprehensibility factors is present, a ratio in the range of 1:1 or 2:1 is all that due process will allow." *Id.* at 487. Likewise, in *Bach* v. *First Union National Bank*, 486 F.3d 150, 154-156 (6th Cir. 2007), the Sixth Circuit invoked *State Farm*'s "helpful guideline[ ]" of 1-to-1. Because economic damages of $400,000 were "substantial," the court concluded that "an award of punitive damages at or near the amount of compensatory damages" was the constitutional maximum. *Id.* at 156. A "plaintiff who receives a considerable compensatory damages award," the court held, "ought not also receive a sizeable punitive damages award absent special circumstances," such as where "a particularly egregious act has resulted in only a small amount of economic damages." *Ibid.* (internal quotation marks omitted).

Other courts interpret *State Farm* similarly. The First Circuit has limited punitive damages to a 1-to-1 ratio on a "substantial" compensatory award of $35,000 (despite finding "a real and serious threat of violence" and "disregard" for the "safety of others"). *Mendez-Matos* v. *Municipality of Guaynabo*, 557 F.3d 36, 53-56 (1st Cir. 2009). In *Williams* v. *ConAgra Poultry Co.*, 378 F.3d

790, 799 (8th Cir. 2004), the Eighth Circuit invoked *State Farm* to reduce punitive damages to a 1-to-1 ratio, finding $600,000 to be a "large compensatory award" and seeing no reason to "depart[ ] from the heartland of permissible exemplary damages." And in *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-603 (8th Cir. 2005), that court again invoked *State Farm* to reduce a punitive award from just under 4-to-1 to 1.2-to-1 on compensatory damages of $4,025,000, even though the defendant engaged in "highly reprehensible" misconduct, "misled consumers," and "exhibited a callous disregard" for public health, resulting in "a most painful, lingering death." *Ibid.* As the Third Circuit has summarized, many courts "have used a 1:1 ratio as a benchmark when compensatory damages are substantial." *Jurinko*, 305 F. App'x at 27-28, 30.

The Ninth and Federal Circuits have taken a contrary approach. Rather than treating 1-to-1 as the benchmark in cases with a "substantial" compensatory award, they use 4-to-1 or any single-digit ratio as the starting point—and move up from there. The Ninth Circuit has ruled that "*State Farm*'s 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter* v. *Provident Life & Accident Ins. Co*, 373 F.3d 998, 1014 (9th Cir. 2002). Accordingly, that court holds that, "where there are significant economic damages and * * * behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of constitutionality." *Planned Parenthood* v. *Am. Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005). For "more egregious behavior," it has ruled, "a single-digit ratio greater than 4 to 1 might be constitutional." *Ibid.* Following a similar approach, the Federal Circuit has upheld a $50 million punitive award that was more than three times the compensatory award of $15

million, holding that such an award does "not even reach[] the 4-to-1 ratio mentioned by the Court as a threshold where the punitive award may become suspect." *Rhone-Poulenc*, 345 F.3d at 1372.

The decision below follows that same path. After labeling the conduct at issue highly reprehensible based on one factor—alleged deceit—the court's analysis began and ended with the assertion that the ratio was 4.06-to-1. App., *infra*, 15a. That analysis may be consistent with the Ninth Circuit's use of a 4-to-1 benchmark and the Federal Circuit's holding that 4-to-1 is the "threshold" where a "punitive award may become suspect." But none of those cases can be reconciled with the many decisions from other jurisdictions that treat the 1-to-1 ratio identified in *State Farm* as the benchmark where compensatory damages are substantial.

The cases also squarely conflict on their facts. Just as in the Federal Circuit's decision in *Rhone-Poulenc* and the Sixth Circuit's decision in *Bridgeport Music*, the sole factor supporting "reprehensibility" here was deceit. Compare *Rhone-Poulenc*, 345 F.3d at 1371 ("malice, trickery, or deceit"), and *Bridgeport Music*, 567 F.3d at 486 ("intentional malice, trickery, or deceit"), with App., *infra*, 16a ("deceit"). Yet the court below nonetheless upheld a 4.06-to-1 punitive award based on an already substantial compensatory award. That decision flies in the face of the rule followed by most other courts—that a "plaintiff who receives a considerable compensatory damages award ought not also receive a sizeable punitive damages award absent special circumstances," such as where "a particularly egregious act has resulted in only a small amount of economic damages." *Bach*, 486 F.3d at 156 (internal quotation marks omitted).

State courts are likewise in conflict. Some treat 1-to-1 as the presumptive benchmark.[7] Others use 4-to-1 or more.[8] Respondents in this very case acknowledged that disarray, variously advising the trial court that, according to "a former [Oklahoma] Supreme Court justice," anything "within the 4 rule" (*i.e.*, 4-to-1) is "fine"; that "you're good up to 10"; and that "you can find cases across the board that justify almost any ratios," whether "a 500:1 ratio, 150:1 ratio, [or] a 96:1 ratio." 8/18/2008 Tr. 29, 34 (App., *infra*, 55a-56a, 57a). On that lattermost point, respondents are correct: It *is* possible to find cases supporting virtually any ratio on any set of facts.

This Court concededly "ha[s] been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive

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[7] *Roby* v. *McKesson Corp.*, 219 P.3d 749 (Cal. 2009) (1-to-1 maximum on actual damages of $1.9 million); *Roth* v. *Farner-Bocken Co.*, 667 N.W.2d 651, 669-671 (S.D. 2003) (limiting punitive damages to sum "at or near" the "substantial compensatory damage award of $25,000"); *Sec. Title Agency, Inc.* v. *Pope*, 200 P.3d 977, 1000-1001 (Ariz. Ct. App. 2008) (reducing punitive damages to match "substantial" $6.1 million compensatory award despite presence of "two reprehensibility factors"); *Burns* v. *Prudential Sec., Inc.*, 857 N.E.2d 621, 652-653, 659-660 (Ohio Ct. App. 2006) (reducing punitive damages to approximate actual damages of $6 million where the harm "was wholly economic").

[8] *Hayes Sight & Sound, Inc.* v. *ONEOK, Inc.*, 136 P.3d 428, 447-448 (Kan. 2006) (reading *Gore* and *State Farm* as presumptively authorizing 4-to-1; holding 6-to-1 permissible because it is a "single-digit multiplier[ ]"; rejecting 1-to-1 benchmark as a "distort[ion]"); *Goddard* v. *Farmers Ins. Co. of Or.*, 179 P.3d 645, 662, 667 (Or. 2008) (using "four times * * * compensatory damages" as "very general rule of thumb" for economic injuries, while allowing "a higher ratio * * * in unusual circumstances"); *Seltzer* v. *Morton*, 154 P.3d 561, 612, 614 (Mont. 2007) (limiting ratio to single digits solely because there was no profit motive or recidivism); *Flax* v. *DaimlerChrysler Corp.*, 272 S.W.3d 521 (Tenn. 2008) (5-to-1 on damages of $2.5 million).

damages award." *State Farm*, 538 U.S. at 424. But it is now apparent that the primary determinant of the constitutionally permissible award—1-to-1, 4-to-1, or beyond—is the court in which the issue arises. In *Exxon Shipping*, this Court recognized the disarray and expressed "doubt[] that anything but a quantified approach will work." 128 S. Ct. at 2628. That doubt is now certainty. This Court should grant review to give urgently needed guidance.

B. This Case Represents An Ideal Vehicle For Resolving This Important And Recurring Issue

The issue is also important and recurring. Where compensatory awards are substantial, the choice between a baseline of 1-to-1, 4-to-1, or single-digits can be enormous. In this case, *Rhone-Poulenc*, and *Flax*, for example, the difference was at least $30 million. Even seemingly small differences in the ratio can have important economic consequences. For instance, here, the court below calculated the ratio as 4.06:1. But the ".06" portion of the punitive damages award by itself is greater than the entire amount Shell failed to pay.[9] And juries regularly return large punitive damages awards around the Nation.

The disuniformity has enormous consequences for plaintiffs and defendants alike. Where courts take *State Farm*'s reference to a 1-to-1 ratio seriously, plaintiffs—like the copyright holders in *Bridgeport Music*, the elderly widow in *Bach*, and the victims in *Boerner*—are being denied awards they would otherwise receive. Where courts do not, defendants, like Shell here, are subjected to potentially unconstitutional deprivations. Either way, the brand of federal constitutional law the parties receive

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[9] 0.06 times $13.2 million is $792,000; the amount Shell failed to pay was $750,708.

depends largely on the happenstance of the jurisdiction in which the case is brought.

This case represents an appropriate vehicle for resolving the issue. In terms of reprehensibility, this case is at the lower end of the scale: Of the five reprehensibility factors this Court has identified, the court of appeals found only one present—deceit. See p. 10, *supra*. The case clearly does not involve any "special circumstance[ ]" that might justify an upward departure from a 1-to-1 benchmark. *Bach*, 486 F.3d at 156.

The reasoning of the court below also vividly illustrates the importance of considering the substantiality of the compensatory award in setting the appropriate ratio. The court held that a 4.06-to-1 ratio was permissible here because it "compares favorably with that in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 [(1993)], where the jury awarded $19,000.00 in actual damages arising from the defendant's baseless claim on plaintiff's oil and gas interests and $10,000,000.00 in punitive damages." App., *infra*, 15a-16a. "Proportionately," the court noted, "Shell has received a much lighter sanction." *Id.* at 16a. But the court ignored the fact that the permissible ratio in a case with such a modest compensatory award has no bearing where, as here, the compensatory award is self-evidently "substantial." See *State Farm*, 538 U.S. at 425. Moreover, because the plurality in *TXO* relied on *potential* harm of "between $5 and $8.3 million," 509 U.S. at 461, the ratio of punitive damages to "actual *or potential harm* suffered" in *TXO*, see *State Farm*, 538 U.S. at 418 (emphasis added), was actually less than 2-to-1, approaching 1-to-1. The "lesson of *TXO*" is that "punitive damages can match the scale of the *attempted* swindle." *Willow Inn*, 399 F.3d at 234 (emphasis added). Because this case was not about potential harm—any "attempted swindle" was limited to the

$750,708 Shell actually failed to pay—*TXO*'s "analysis is inapposite." *Ibid.* This is thus an ideal case in which to make clear that this Court meant what it said in *State Farm*—that the size of the compensatory award matters and that, where that award is already substantial, a 1-to-1 ratio is normally the "outermost limit of the due process guarantee." 538 U.S. at 425.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to consider summary reversal with respect to the first question presented.

Respectfully submitted.

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APPENDIX

APPENDIX A
IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA
DIVISION III

CASE NO. 106,470

NANCY FULLER HEBBLE AND SUSAN FULLER MALEY, AS INDIVIDUALS; NANCY FULLER HEBBLE AND SUSAN FULLER MALEY, AS CO-TRUSTEES OF THOMAS R. FULLER TESTAMENT TRUST; WACHOVIA BANK, N.A., AS EXECUTOR OF THE ESTATE AND TRUST OF ELIZABETH FULLER GARDNER TRUST; AND MARSHALL T. STEVES, TRUSTEE OF THE DINGS TRUST AGENCY,
Plaintiff/Appellees,

VS.

SHELL WESTERN E & P, INC., AND SHELL OIL COMPANY,
Defendant/Appellants.

Appeal from the District Court of
Stephens County, Oklahoma
Honorable Michael C. Flanagan, Trial Judge

(DECEMBER 18, 2009)

AFFIRMED

OPINION BY CAROL M. HANSEN, Presiding Judge:

¶1 Defendant/Appellants, Shell Western E & P, Inc. and Shell Oil Company (collectively Shell), seek review of the trial court's judgment based on a jury verdict in favor of

Plaintiff/Appellees (Owners) for $13,205,916.00 in actual damages and $53,625,000.00 in punitive damages in Owners' action for underpayment of oil and gas proceeds. At issue is whether Owners' claims sounded in tort such that the statute of limitations was tolled until Owners learned of their loss. We hold Shell owed a fiduciary duty to Owners arising from its resort to the police powers of the state in unitizing oil and gas interests, and therefore, Owners timely brought a tort claim. We find no error of law in the conduct of trial and affirm.

¶2 Owners are the successors to a net profits interest reserved in a 1927 assignment of an oil and gas lease (Crews Lease) in Stephens and Carter Counties, Oklahoma.[1] Shell acquired the Crews Lease in 1948 and drilled wells on the lease through the 1950s, paying a share of the net profits to Owners or their predecessors. In 1964, the Oklahoma Corporation Commission (Commission) granted Shell's application to create a waterflood unit for secondary recovery in the Sims Sand, called the Brittain Sims Unit. The Commission's order adopted a unitiza-

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[1] The assignment provided in part,

If said well produces oil or gas in paying quantities, then in that event the party of the second part, as an additional consideration for the assignment, agrees to carry the party of the first part for an undivided one-fourth (1/4) of the seven-eighths (7/8) working interest in said above described oil and gas mining lease; that is to say, the party of the second part shall advance all of the cost of drilling, development and operation necessary or convenient, and shall receive all of the oil and gas produced therefrom until the sales of oil and gas produced from said property shall have reimbursed the party of the second part for all monies so expended in the drilling, development and operation of said lease, including all cost of investment and expense necessary or incident to the proper development and operation of said property, and after the second party has been so reimbursed, then the party of the first part is to receive one-fourth (1/4) of the net profits derived by the party of the second part from said premises.

tion plan which designated Shell as the unit operator. The plan expressly addressed net profits interests:

> Any net profits, net proceeds, or other interest of a similar nature, which is payable out of profits resulting from operations under the instrument creating such interest, shall be payable as provided in such instrument, except that as to the Unitized Formation underlying the lands covered thereby included in the Unit Area, such computations shall be based not upon actual production from and costs incurred in operations on such land, but instead upon that portion of the unit production and unit expense which is allocated to such lands under the terms hereof.

In 1970, the Commission created the Brittain Deese Unit for secondary recovery by waterflood in the Deese Sands. It again adopted a unitization plan designating Shell as operator and providing the same language quoted above regarding net profits interests.

¶3 In 1972, the Commission adopted an order establishing 80-acre drilling and spacing units for the development of oil from the Sycamore formation. The order provided in part:

> 4. That all royalty interests within any spacing unit shall be communitized and each royalty owner within any unit shall participate in the royalty from the well drilled thereon in the relation that the acreage owned by him bears to the total acreage in the unit.
>
> 5. That in the event there are divided or undivided interests within any unit and the parties are unable to agree on a plan for the development of the unit, then their rights and equities shall be adjudicated

by the Commission as provided for by subsection d, Section 87.1; Title 52, OSA.

Shell was the operator of the Brittain Deep No. 2, a unit well in the Sycamore. According to Shell, the Brittain Deep No. 2 was not located on the Crews Lease but was in the same 80-acre drilling and spacing unit for the Sycamore, and therefore revenue and expenses from that well should have included in the net profits calculations for the Crews Lease.

¶4 In 1985, Shell sold its interest in the Crews Lease to Maynard Oil Company (Maynard). Shell admits it failed to pay Owners $750,708.00 in net profits from 1973 through 1985. Over $715,000.00 from the Brittain Deep No. 2 Well and the rest was from the Brittain Deese Waterflood Unit. Shell paid the net profits due from the Brittain Sims unit.

¶5 In 1995, Owners filed the suit below against Shell and Maynard, seeking actual and punitive damages under theories of fraud and breach of statutory and quasi-fiduciary duties. Maynard settled with Owners and was dismissed. Shell filed multiple motions for summary judgment on statute of limitations grounds, among others. The trial court denied summary judgment, ruling Shell as operator had a fiduciary or quasi-fiduciary duty to non-operators whose interests were unitized by Commission order. It ruled Shell's duties continued until repudiation by Shell and communication of the repudiation to Owners. It found there were issues of material fact preventing summary judgment on the statute of limitations defense to the breach of fiduciary claim. It also found there was an issue of material fact as to when Owners knew or should have known of Shell's alleged fraud, preventing summary judgment on the statute of limitations defense to Owners' fraud claim.

¶6 The parties tried the matter to a jury in May 2008. The trial court bifurcated the issues of liability and actual damages from the issue of punitive damages. The jury found for Owners on their claims for (1) false representation, nondisclosure or concealment, deceit, or constructive fraud, and (2) breach of fiduciary duty. It awarded actual damages in the amount of $13,205,916.00. Prior to submitting the case to the jury at the second stage of trial, the trial court lifted the cap on punitive damages pursuant to the statute in effect at the time the case was filed, 23 O.S.1991 §9(A). The jury then awarded $53,625,000.00 in punitive damages. The trial court entered judgment for Owners in the amount of $66,830,916.00. It denied Shell's motions for judgment notwithstanding the verdict and for remittitur or new trial. Shell appeals from these orders.

I

¶7 As a threshold matter, we must address Shell's contention the trial court erred in ruling Shell had a fiduciary duty to Owners and the statute of limitations did not begin to run on Owners' claim for breach of the fiduciary duty until Shell repudiated its fiduciary duty and communicated that repudiation to Owners. Shell asserts Owners' claims are contract-based and subject to the five-year limitations period of 12 O.S. Supp. 2008 § 95(A)(1).

¶8 In Oklahoma, oil and gas operators have no fiduciary duty to non-operators arising solely from contracts such as leases, communitization agreements, or joint operating agreements. *Howell v. Texaco Inc. (Howell)*, 2004 OK 92, 112 P.3d 1154, 1160-1161, and *Tarrant v. Capstone Oil and Gas Co. (Tarrant)*, 2008 OK CIV APP 17, 178 P.3d 866, 870-871. An operator's breach of duties under such agreements gives rise to a breach of contract claim,

not a breach of fiduciary duty claim. *Tarrant*, 178 P.3d at 871.

¶9 However, the Oklahoma Supreme Court has "recognized the existence of a fiduciary duty owed by a unit to the royalty owners and lessees who are parties to the unitization agreement or subject to the order creating the unit. This is not a duty created by the lease agreement but rather by the unitization order and agreement." *Leck v. Continental Oil Co. (Leck)*, 1989 OK 173, 800 P.2d 224, 229. After unitization, the leases no longer control. *Howell*, 112 P.3d at 1161. Instead, the parties' relationships are defined by statute and by Commission order. "The unit organization with its operator stands in a position similar to that of a trustee for all who are interested in the oil production either as lessees or royalty owners." *Young v. West Edmond Hunton Lime Unit*, 1954 OK 195, 275 P.2d 304, 309. The fiduciary duty of the unit operator arises not only from the creation of field-wide units for secondary recovery under 52 O.S. 2001 §§ 287.1-287.15, but also from the creation of drilling and spacing units under 52 O.S. Supp. 2007 §87.1. *E.g., Leck*, 800 P.2d at 229. The critical factor is the resort to the police powers of the state on the part of a lessee in unitization proceedings which modify and amend existing legal rights. *Olansen v. Texaco Inc.*, 1978 OK 139, 587 P.2d 976, 985.

¶10 In the present case, Shell as the unit operator owed a fiduciary duty to Owners to properly account for and distribute oil and gas proceeds from the units. As to the Brittain Deese unit, this duty clearly arose from the Commission order creating the unit and appointing Shell as unit operator. The situation as to the Brittain Deep No. 2 unit is less clear-cut. The Commission created the unit and ordered the royalty interests communitized, but it did not pool the working interests and appoint an oper-

ator. Shell became the operator pursuant to a joint operating agreement (JOA) between the working interest owners. Had Owners been parties to the JOA, we would not find a fiduciary duty. Owners were not parties to the JOA because the net profits interest, although carved out of the working interest, did not include the right to drill. The Brittain Deep No. 2 was not drilled on the Crews Lease; therefore Shell's duty to Owners arose from the Commission's exercise of its police power on the lessees' behalf. Owners' right to payment from the oil proceeds in the unit was communitized as royalty within the meaning of the term as used in § 87.1 and the Commission's order.[2] Accordingly, Shell as the unit operator owed a fiduciary duty to Owners.

¶11 The trial court instructed the jury an action for breach of fiduciary duty must be brought within two years of the date Owners knew or should have been aware Shell repudiated its fiduciary duties to Owners. It defined repudiation as "a clear, express communication of rejection of the fiduciary duty." The instruction is correct but incomplete. The trial court based the instruction on the rationale of Justice Summers' opinion, concurring in result, in *Goodall v. Trigg Drilling Co., Inc. (Trigg)*, 1997 OK 74, 944 P.2d 292, 297, in which he characterized the relationship between operator and royalty interest owner as quasi-fiduciary and cited *Becker v. State ex rel Dept. of Public Welfare*, 1957 OK 102, 312 P.2d 935, 942

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[2] The treatment of a net profits interest as a royalty interest is consistent with the definition of royalty interest in the Production Revenue Standards Act, 52 O.S. 2001 § 570.2(6), as a "percentage interest in production or proceeds . . . reserved or granted by a mineral interest owner exclusive of any interest defined as a working interest or subsequently created interest." It is not a "subsequently created interest" under § 570.2(10) because the assignment reserving the interest did not specify the interest would not be communitized.

for the proposition "the statute of limitations begins to run when a trustee repudiates the trust and such fact is brought to the knowledge of the beneficiary." However, both Summers and the majority recognized the running of the limitations period would be triggered by the interest owner's knowledge the operator owed the interest owner money. *Trigg*, 944 P.2d at 295 and 297.

¶12 In other words, the discovery rule applicable in tort cases applies to breach of fiduciary duty. The statute of limitations on Owners' claims for breach of fiduciary duty began to run when they knew or, in the exercise of reasonable diligence, should have known of their injury. *Szczepka v. Weaver*, 1997 OK CIV APP 35, 942 P.2d 247, 249. Merely showing Owners knew the well was producing would not be sufficient to show they knew or should have known of their injury. Owners were not due payment until sales of oil and gas produced from the property had reimbursed the operator for the expenses of drilling, development and operation of the lease. This information was available only from Shell. Owners would not know Shell held proceeds belonging to them, and whether they were due payment, until they knew the amount of sales and expenses for the units.

¶13 Although the trial court did not instruct the jury on the discovery rule with regard to the breach of fiduciary duty claim, it did instruct on the discovery rule as to the statute of limitations on Owners' claim for false representation. The trial court presented the two claims to the jury as alternative theories of recovery for the same injury, and the jury found for Owners on both claims. In order to find for Owners on the false representation claim, the jury had to find Owners did not know Shell was not paying them their share of the net profits prior to a date two years before they filed their petition. There-

fore, we are unable to find the jurors were misled and reached a different conclusion than they would have reached but for the incomplete instruction on the running of the limitation period for breach of fiduciary duty. *Cimarron Feeders, Inc. v. Tri-County Elec. Coop., Inc.*, 1991 OK 104, 818 P.2d 901, 902.

II

¶14 Shell's next contention is the trial court erred in failing to instruct the jury on the proper burden of proof for fraud. Owners assert Shell failed to preserve any error from the refusal to give Shell's requested instructions Nos. 36 and 38. We agree. The manner for objecting to jury instructions is set forth in 12 O.S. 2001 § 578:

> A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to make objection thereto by dictating into the record in open court, out of the hearing of the jury, after the reading of all instructions, the number of the particular instruction that was requested, refused and is excepted to, or the number of the particular instruction given by the court that is excepted to. Provided, further, that the court shall furnish copies of the instructions to the plaintiff and defendant prior to the time said instructions are given by the court.

At the jury instruction conference during the trial below, Shell's attorney dictated into the record the numbers of the jury instructions Shell requested, the trial court refused, and Shell excepted to. Shell did not include requested instructions Nos. 36 and 38 in its listing. After stating Shell's objections to the refused instructions, its attorney made a blanket exception to all of the instructions that were given. He did not make a blanket excep-

tion to the refused instructions. Based on this record, we do not find Shell made known to the trial court its objection to the refusal to give Shell's requested instructions 36 and 38. The burden of proof instruction the trial court gave was Oklahoma Uniform Jury Instruction - Civil No. 3.1, which was Shell's requested instruction No. 8. We find no fundamental error.

¶15 Shell also argues the jury's verdict is unsupported by any evidence each Owner relied on Shell's misrepresentation. In order to preserve a challenge to the sufficiency of the evidence, a party must move for directed verdict at the close of all the evidence and before the issues are submitted to the jury. *Drouillard v. Jensen Const. Co. of Oklahoma, Inc.*, 1979 OK 126, 601 P.2d 92, 94. Shell waived any challenge to the sufficiency of the evidence by failing to do so.

¶16 Shell also challenges the use of a general verdict form. We find no abuse of discretion in the trial court's refusal to direct special findings. OKLA. CONST. Art. 7, § 15.

III

¶17 Shell's next contention is the trial court erred in awarding prejudgment interest under the Production Revenue Standards Act (PRSA), 52 O.S. 2001 § 570.10 (§ 540 prior to renumbering by Laws 1992, c.190, § 28). Shell argues (1) prejudgment interest may not be awarded because Owners waived their statutory claim by not submitting it to the jury, (2) a claim for interest under § 570.10 is barred by the statute of limitations and the jury should have been instructed on that defense, and (3) the trial court improperly applied the statute retroactively.

¶18 The PRSA does not create a statutory claim. *Purcell v. Santa Fe Minerals, Inc.*, 1998 OK 45, 961 P.2d 188,

191-194. Rather, it imposes standards for the treatment of proceeds from the sale of oil and gas production. e.g., §§ 570.4, 570.6, and 570.10. The Legislature expressly stated its intent the PRSA applies "to all producing wells, regardless of the date pooled, drilled or of the date of the underlying leases." § 570.3. Section 570.14 sets forth a five-year statute of limitations on actions brought pursuant to its provisions, but provides in subsection (D), "nothing shall create, limit or expand any statute of limitations applicable to production occurring prior to September 1, 1992."

¶19 Section 570.10 provides in part,

> A. All proceeds from the sale of production shall be regarded as separate and distinct from all other funds of any person receiving or holding the same until such time as such proceeds are paid to the owners legally entitled thereto. Any person holding revenue or proceeds from the sale of production shall hold such revenue or proceeds for the benefit of the owners legally entitled thereto. Nothing in this subsection shall create an express trust.
>
> B. Except as otherwise provided in this section:
>
> 1. Proceeds from the sale of oil or gas production from an oil or gas well shall be paid to persons legally entitled thereto:
>
> a. commencing not later than six (6) months after the date of first sale, and
>
> b. thereafter not later than the last day of the second succeeding month after the end of the month within which such production is sold.
>
> . . .
>
> D. 1. Except as otherwise provided in paragraph 2 of this subsection, where proceeds from the sale of

> oil or gas production or some portion of such proceeds are not paid prior to the end of the applicable time periods provided in this section, that portion not timely paid shall earn interest at the rate of twelve percent (12%) per annum to be compounded annually, calculated from the end of the month in which such production is sold until the day paid.

From 1980 to 1989, the statute provided for interest of twelve percent per annum, without compounding. Laws 1980, c. 205, § 1, and Laws 1989, c. 241, § 1. Although the statute applies to all producing wells, it only alters rights and duties prospectively. *Teel v. Public Service Co. of Oklahoma,* 1985 OK 112, 767 P.2d 391, 399 (superseded by statute on other grounds). The prejudgment interest authorized by § 570.10 constitutes a part of the judgment and is considered a part of the total liability recovered. *Fleet v. Sanguine, Ltd.*, 1993 OK 76, 854 P.2d 892, 899. Prior to the statute's enactment, the general prejudgment interest statute applied, allowing six percent interest when damages were certain or capable of being made certain by calculation. 23 O.S. 2001 § 6 and 15 O.S. 2001 § 266.

¶20 Shell held production proceeds belonging to Owners. During the time it held those proceeds, the proceeds were regarded as separate and distinct from all other funds of Shell. The proceeds Shell held prior to 1980 were subject to prejudgment interest pursuant to 23 O.S. 2001 § 6. From 1980 to 1989 the proceeds were subject to interest provided by the version of § 540 (§ 570.10) in effect at the time. When Shell continued to hold the proceeds after the effective date of the 1989 amendment, the proceeds were subject to the compounded interest rate of twelve percent in effect thereafter. The trial court's instruction to the jury properly incorporated the applicable

law on the awarding of prejudgment interest for each time period.

IV

¶21 Lastly, Shell contends the improper punitive damages award requires new trial or remittitur. It argues (1) punitive damages are not allowed for breach of contract, (2) punitive damages should have been capped because there was no evidence of evil intent, (3) punitive damages duplicated the penalty of prejudgment interest under § 540 (§ 570.10), (4) prejudgment interest was not part of compensatory damages and should not have been considered in determining the amount of punitive damages, and (5) the punitive damages award was excessive and in violation of the U.S. Constitution.

¶22 As discussed in Part I above, Owners properly brought this action in tort and not in contract. As discussed in Part III above, prejudgment interest under the PRSA is part of compensatory damages. Although prejudgment interest under § 540 (§ 570.10) was characterized as penal in *Fleet v. Sanguine, Ltd.*, 1993 OK 76, ¶11, 854 P.2d 892, 899-900, and *McClain v. Ricks Exploration Co.*, 1994 OK CIV APP 76, ¶18, 894 P.2d 422, the Court in *Purcell v. Santa Fe Minerals, Inc.*, 1998 OK 45, ¶17, 961 P.2d 188, recognized the Legislature abrogated that characterization by deleting the phrase "as a penalty" from the statute in 1985. Therefore, the imposition of prejudgment interest does not preclude a punitive damages award.

¶23 The trial court applied the punitive damage statute in effect at the time this case was filed, 23 O.S. 1991 § 9, which provided in part,

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of conduct evincing a wanton or reckless

> disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of actual damages awarded. Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing the defendant, and the percentage limitation on such damages set forth in this section shall not apply.

The trial court made the requisite finding on the record and out of the presence of the jury there was "clear and convincing evidence of fraud, non-disclosure, concealment, deceit," and lifted the cap on punitive damages. It then submitted the question of punitive damages to the jury.

¶24 We review the trial court's initial determination of the presence of clear and convincing evidence of fraud for error of law. *Rodebush By and Through Rodebush v. Oklahoma Nursing Homes, Ltd.*, 1993 OK 160, 867 P.2d 1241, 1247. The testimony of Shell's division order analyst provided clear and convincing evidence Shell knew in 1988 it held oil proceeds belonging to Owners. The testimony of Shell's designated corporate representative is clear and convincing evidence (1) Shell knew Owners did not know about the proceeds, (2) Shell did not tell Owners about the proceeds, (3) Shell knew Owners relied

on Shell's operating statements, and (4) Shell intended to keep Owners' proceeds based on its position the statute of limitations had run in 1987, two years after it sold the Crews Lease to Maynard. Based on this record, we hold the trial court did not err as a matter of law in its initial determination of the presence of clear and convincing evidence of fraud.

¶25 A grossly excessive punitive damage award violates the Fourteenth Amendment right to due process. *BMW of North America, Inc. v. Gore (Gore)*, 517 U.S. 559, 569, 116 S. Ct. 1589, 1595, 134 L. Ed. 2d 809. In reviewing punitive damages for constitutionality, we must "consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 1520, 155 L. Ed. 2d 585.

¶26 In the present case, the reprehensibility of Shell's conduct is heightened by its intentional deceit of the interest owners whose oil proceeds it held for their benefit while it owed a fiduciary duty to those owners arising from its resort to the police powers of the state in unitizing oil and gas interests. The amount of the punitive damage award was slightly more than four times the amount of the actual damages awarded. We do not find this disparity unreasonable. The punitive damage award in this case compares favorably with that in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711, where the jury awarded $19,000.00 in actual damages arising from the defendant's baseless claim on plaintiff's oil and gas interests and

$10,000,000.00 in punitive damages. Proportionately, Shell has received a much lighter sanction.

¶27 For the foregoing reasons, the trial court's judgment is AFFIRMED.

MITCHELL, C.J., and HETHERINGTON, J. (sitting by designation), concur.

APPENDIX B
IN THE DISTRICT COURT OF STEPHENS COUNTY STATE OF OKLAHOMA

CASE NO. CJ-1995-234L

NANCY FULLER HEBBLE, *ET AL.*,
Plaintiffs,

v.

SHELL WESTERN E & P, INC., AND SHELL OIL COMPANY,
Defendants.

(OCTOBER 6, 2008)

ORDER

NOW ON this 18th day of August, 2008, the above-cause comes on before me, the undersigned Associate District Judge, upon the following:

A. Defendants' Motion for Judgment as a Matter of Law and Judgment Notwithstanding the Verdict and Brief in Support; and,

B. Defendants' Motion for Remittitur or for New Trial.

Plaintiffs appear by counsel, Randall K. Calvert, Clark O. Brewster, and Guy A. Fortney; Defendants appear by counsel, R. Brad Miller and Gregory A. McKenzie; WHEREUPON, the Court considered the motions of Defendants and the responses of Plaintiffs; considered

the briefs and argument of counsel; and after being fully advised, finds and orders as follows, to-wit:

DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

1. In their first proposition, Defendants contend that the Court erred in finding the existence of a fiduciary or quasi-fiduciary relationship between the parties. In reviewing Defendants' motion and brief, the Court finds that Defendants simply restate their previous arguments which were addressed in the Court's previous orders and rulings, with no new factual or legal basis. Therefore, Defendants' motion on this ground is hereby overruled, AND IT IS SO ORDERED.

2. In their second proposition, Defendants contend that the Court erred in finding the statute of limitations did not begin to run on Plaintiffs' claim for breach of fiduciary duty until Defendants repudiated such duty and Plaintiffs knew of the repudiation. Again, Defendants simply restate their previous arguments which were addressed in the Court's previous orders and rulings, with no new factual or legal basis. Therefore, Defendants' motion on this ground is likewise overruled, AND IT IS SO ORDERED.

3. In their third proposition, Defendants contend as follows:

a. Plaintiffs abandoned their claim under **Okla. Stat. tit. 52, §§ 540 or 570.10** by choosing not to submit that claim to the jury;

b. Plaintiffs' contractual claim to net profits does not fall within the provisions of **Okla. Stat. tit. 52, § 540**;

c. That the ***Production Revenue Standards Act*** found at **Okla. Stat. tit. 52, § 570.1, et seq.**, did not apply to this action;

d. That the compounding interest provisions of **Okla. Stat. tit. 52, § 540** enacted in 1989 did not apply in this action; and,

e. That the interest rate provisions of **Okla. Stat. tit. 52, § 540**, effective July 1, 1980, did not apply to Plaintiffs' causes of action accruing prior thereto.

Except for paragraph 3(a) above, Defendants simply restate previous arguments without any new factual or legal basis; therefore, Defendants' motion on the grounds stated in paragraphs 3(b), 3(c), 3(d), and 3(e), is overruled. As to Defendants' argument set forth in paragraph 3(a) above, the Court finds that prior to trial, the parties agreed there was no dispute in this case concerning the following:

f. Marketability of Plaintiffs' title;

g. The amount of actual production by Defendants; and,

h. That Defendants' had not paid to Plaintiffs their share of the actual production.

As a result, the Court held by its order filed April 18, 2008, that the interest rates contained in **Okla. Stat. tit. 52, § 540 and 570.10** were applicable, effective prospectively from the date of each statutory rate change, and that the ***Production Revenue Standards Act*** was applicable from and after its effective date. The Court simply instructed the jury accordingly. Based on the Court's rulings, there were no disputed issues under **§ 540 or 570.10** to submit to the jury. Therefore, Defen-

dants' motion on the ground stated in 3(a) above is likewise overruled, AND IT IS S0 ORDERED.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

4. Defendants contend that they are entitled to judgment notwithstanding the verdict for the following reasons:

a. Plaintiffs' claims are exclusively in contract for which punitive damages are not recoverable.

b. No fiduciary duty existed under Oklahoma law, and in the absence of a fiduciary duty, there was no basis for any claim of fraud, including fraud based upon theories of purported concealment and constructive fraud.

c. There was no competent evidence of each of the essential elements of Plaintiffs' fraud theories.

d. Plaintiffs' claims are barred by the applicable statute of limitations and Plaintiffs' did not meet their burden of proving any tolling of the statute of limitations.

e. There was no competent evidence of the type of conduct that would warrant an award of punitive damages.

f. There was no clear and convincing evidence of the type of conduct necessary to lift the cap on punitive damages.

A motion for judgment notwithstanding the verdict (JNOV) should be granted only if there has been no evidence presented by Plaintiffs showing a right to recover. ***Fowler v. Lincoln County Conservation Dist.*, 2000 OK 96, 15 P.3d 502, 506.** The general standard of review for a denial of a motion for directed verdict or for judgment

notwithstanding the verdict requires the appellate court to examine the record ***for any evidence*** that reasonably tends to support a judgment for the party against whom the motion was made, disregarding all evidence in favor of the moving party. ***Thomason v. Pilger***, **112 P.3d 1162, 2005 OK 10**; ***Myers v. Maxey***, **1995 OK CIV APP 148, 915 P.2d 940**; ***Trett v. Oklahoma Gas & Electric Co.***, **1989 OK 54, ¶6, 775 P.2d 275, 277**; ***Woods v. Fruehauf Trailer Corp.***, **1988 OK 105, ¶ 8, 765 P.2d 770, 772**. In fact, a motion for judgment notwithstanding the verdict should not be granted unless there is an entire absence of proof on a material issue. ***First Nat. Bank in Durant v. Honey Creek Entertainment Corp.***, **2002 OK 11, 54 P.3d 100**. In this case, the Court finds sufficient evidence was presented to support the jury verdict and the judgment of the Court on all issues. Therefore, Defendants' motion on these grounds is hereby overruled, AND IT IS SO ORDERED.

DEFENDANTS' MOTION FOR REMITTITUR

5. Defendants argue that a remittitur of punitive damages is appropriate in this case because their conduct was not violent; did not affect the health or safety of Plaintiffs or anyone else; that Plaintiffs' damages were economic in nature only; and that the award is grossly excessive or the result of improper passion, prejudice, or sympathy on the part of the jury.

6. This case was filed just prior to August 25, 1995, the effective date of the Oklahoma Legislature's amendment to **Okla. Stat. tit. 23, § 9** (now § 9.1), which would have limited punitive damages in this case. Notwithstanding, the Court, bifurcated the punitive damages proceedings in accordance with the new provisions of § 9.1; however, prior to instructing the jury on punitive damages, the Court found that there was clear and convincing evidence

of fraud and removed the cap on the amount. The Court further instructed the jury that the law did not require them to award punitive damages, but if they did, they must consider the following factors:

a. Punitive damages are not to be considered as compensation to Plaintiffs;

b. That punitive damages are to serve as punishment to Defendants and as an example to others to deter them from like conduct;

c. That the purpose of punitive damages is to punish, not destroy Defendants;

d. The harm the Defendants' conduct caused and is likely to cause;

e. The degree of wrongfulness of Defendants' conduct;

f. How long the conduct lasted and whether it is likely to continue;

g. Whether there was other similar conduct, and if so, how often it occurred;

h. How aware Defendants were of the conduct and its consequences, and whether there were attempts to conceal the conduct;

i. Whether the Defendants benefitted from the conduct, and if so, whether that benefit should be taken away;

j. The need to discourage others from similar conduct; and,

k. The financial resources of the Defendants.

Defendants' request essentially calls for the Court to substitute its own findings for those of the jury relative to the punitive damages award. To do that, the Court

would have to find that the jury's determination was inconsistent with the evidence and the reasonable inferences to be drawn therefrom as a whole. The jury considered the evidence and observed the witnesses and their demeanor and credibility. The effect and weight to be given the evidence and the testimony is for the trier of fact. The Court will not disturb the jury's findings simply because the record might also support a contrary interpretation. In the Court's opinion, the record contains direct evidence which, taken together with all reasonable inferences in Plaintiffs' favor, is sufficient to present a clear and convincing prima facie case of breach of fiduciary duty; false representation; and nondisclosure or concealment. Therefore, the Court will not disturb the jury's determination that punitive damages were appropriately awarded in this case, AND IT IS SO ORDERED.

7. The Court does have the authority to order a remittitur of the punitive damage award if the amount is grossly excessive, or is the result of improper passion, prejudice or sympathy on the party of the jury, AND IT IS SO ORDERED.

8. Perhaps the most important indication of the reasonableness of a punitive damage award is the degree of reprehensibility of Defendants' conduct. ***BMW of North America, Inc., v. Gore*, 517 U.S. 559, 116 S. Ct. 1589.** In this case, the record supports the jury's finding that Defendants' conduct was very reprehensible. It is true that nonviolent acts are less serious than acts marked by violence or threats of violence. Similarly, trickery and deceit are more reprehensible than negligence or mistake. The evidence in this case clearly supports the finding of the jury that Defendants knew that Plaintiffs were entitled to their share of production; knew the actual

amount of production and the Plaintiffs' share thereof; knew they had not paid Plaintiffs; concealed their non-payment; and made misrepresentations about such non-payment. This Court finds that the aggravating factors associated with reprehensible conduct are present in this case and support the amount of the punitive damage award, AND IT IS SO ORDERED.

9. The second and most commonly cited indication of unreasonable or excessive punitive damage awards is its ratio to the actual harm inflicted on a Plaintiff. There are cases where low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. ***BMW of North America, Inc., v. Gore,*** **517 U.S. 559, 116 S. Ct. 1589.** Likewise, a higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine. The U.S. Supreme Court has said with respect to the amount of punitive damages that "... we need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that a general concern of reasonableness ... properly enters into the constitutional calculus." ***TXO Production Corp. v. Alliance Resources Corp.,*** **509 U.S. 443, at 458, 113 S. Ct. 2711, at 2720,** quoting ***Pacific Mut. Life Ins. Co. v. Haslip,*** **499 U.S. 1, at 18, 111 S. Ct. 1032, at 1043 (1991).** This Court has already addressed the Defendants' arguments concerning the applicability of interest rates and the effect thereof on the amount of actual damages, and has rejected Defendants' arguments. And the Court is not persuaded that the decision in ***Exxon Shipping Co. v. Baker,*** **128 S.**

Ct. 2605 (2008), which dealt with punitive damages in a maritime case, would require a remittitur in this case. Therefore, the Court concludes that the amount of the punitive damage award in this case of $53,625,000, has a ratio to the actual damages of $13,205,916, of 4.06:1. The Court finds this ratio to be well within a constitutionally acceptable range and will not order a remittitur on that basis, AND IT IS SO ORDERED.

10. The Court further rejects the Defendants' argument that sanctions for comparable misconduct otherwise exist under Oklahoma law which obviate the application of the **Okla. Stat. tit. 23, § 9,** and **Okla. Stat. tit. 52, § 540 and 570.10**, and finds that such argument is not supported in the law. Therefore, the Court will not order a remittitur on that basis, AND IT IS SO ORDERED.

DEFENDANTS' CLAIM THAT ACTUAL DAMAGES WERE EXCESSIVE

11. The Court finds that Defendants' argument that the actual damages awarded in this case were excessive contained no new factual or legal basis, have been addressed above or in previous orders of the Court and rejected, and therefore, the Court will not order a remittitur of actual or punitive damages based thereon, AND IT IS SO ORDERED.

12. The Court also finds that Defendants' survivability-of-claims argument was not timely raised and was not addressed during the trial, and therefore, the same is hereby overruled, AND IT IS SO ORDERED.

DEFENDANTS' ALTERNATIVE MOTION FOR NEW TRIAL

13. After a thorough review of Defendants' Alternative Motion for New Trial and Plaintiffs' Response thereto, the Court finds that for the reasons set forth in

Plaintiffs' response, said motion is hereby overruled, AND IT IS SO ORDERED.

Signed this 30th day of September, 2008.

/s/
MICHAEL C. FLANAGAN
Associate District Judge

APPENDIX C
IN THE DISTRICT COURT OF STEPHENS COUNTY STATE OF OKLAHOMA

CASE NO. CJ-1995-234L

NANCY FULLER HEBBLE AND SUSAN FULLER MALEY, AS INDIVIDUALS; NANCY HEBBLE AND SUSAN MALEY AS CO-TRUSTEES OF THE THOMAS R. FULLER TESTAMENTARY TRUST; WACHOVIA BANK, N.A. AS EXECUTOR OF THE ESTATE OF ELIZABETH FULLER GARDNER AND TRUSTEE OF THE ELIZABETH FULLER GARDNER REVOCABLE TRUST; AND MARSHALL T. STEVES, TRUSTEE OF THE DINGS TRUST AGENCY,

Plaintiffs,

v.

SHELL WESTERN E & P, INC. AND SHELL OIL COMPANY,

Defendants.

(MAY 30, 2008)

JOURNAL ENTRY OF JUDGMENT

The above referenced cause came on for trial on May 1, 2008, through May 9, 2008. Plaintiffs, (1) Nancy Fuller Hebble; (2) Susan Fuller Maley; (3) Nancy Hebble and Susan Maley as Co-Trustees of the Thomas R. Fuller Testamentary Trust; (4) Wachovia Bank, N.A., as Executor of the Estate of Elizabeth Fuller Gardner and Trustee of the Elizabeth Fuller Gardner Revocable Trust; and

(5) Marshall T. Steves, Trustee of the Dings Trust Agency, were represented by Randall K. Calvert, Calvert Law Firm, of Oklahoma City, Oklahoma; and Clark Brewster and Guy Fortney, Brewster & De Angelis, of Tulsa, Oklahoma. Defendants Shell Western E & P, Inc. and Shell Oil Company were represented by R. Brad Miller, Durbin, Larimore and Bialick, of Oklahoma City, Oklahoma; Gregory A. McKenzie, Gregory A. McKenzie, P.C., of Edmond, Oklahoma; and Mack Martin, Martin Law Firm, of Oklahoma City, Oklahoma.

After the jury was empaneled, Plaintiffs proceeded to present their case. Plaintiffs presented witnesses and evidence. At the close of Plaintiffs' evidence, Defendants Shell Western E & P, Inc. and Shell Oil Company demurred to the evidence and moved to dismiss the Plaintiffs' cause. This motion was denied. Defendants then presented witnesses and exhibits. The jury was properly instructed and counsel made closing arguments. The jury retired to deliberate. The jury returned the following verdict:

> We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find for the Plaintiffs on the claim of:
>
> False Representation;
> Nondisclosure or Concealment;
> Deceit; and/or
> Constructive Fraud — Yes ___x___ / No _____
>
> Breach of Fiduciary Duty — Yes ___x___ / No _____
>
> and fix the dollar amount of Plaintiffs' damages in the sum of $13,205,916.

The verdict was unanimous.

At the conclusion of the evidence and prior to the submission of the case to the jury for the bifurcated second stage of the case, the Court found on the record and out of the presence of the jury, clear and convincing evidence that the Defendants are guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, malice or fraud, actual or presumed. Having made the express findings pursuant to **Okla. Stat. tit. 23, § 9**, the trial proceeded to the second stage on the issue of punitive damages.

Plaintiffs presented evidence of the financial condition of Shell Oil Company and rested. The Court instructed the jury on the issue of punitive damages in the second stage of the proceeding. The parties presented closing arguments and the jury retired to deliberate. The jury returned its verdict on May 9, 2008, in favor of the Plaintiffs and awarded punitive damages in the amount of Fifty-three Million, Six Hundred Twenty-five Thousand Dollars ($53,625,000).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows: The Plaintiffs, (1) Nancy Fuller Hebble; (2) Susan Fuller Maley; (3) Nancy Hebble and Susan Maley as Co-Trustees of the Thomas R. Fuller Testamentary Trust; (4) Wachovia Bank, N.A., as Executor of the Estate of Elizabeth Fuller Gardner and Trustee of the Elizabeth Fuller Gardner Revocable Trust; and (5) Marshall T. Steves, Trustee of the Dings Trust Agency, are awarded judgment against Shell Western E & P, Inc. and Shell Oil Company in the amount of Thirteen Million, Two Hundred and Five Thousand, Nine Hundred and Sixteen Dollars ($13,205,916) in actual damages for financial loss and statutory interest thereon, and punitive damages in the amount of Fifty-three Million, Six Hundred Twenty-five Thousand Dollars

($53,625,000), for a total judgment in the amount of Sixty-six Million, Eight Hundred Thirty Thousand, Nine Hundred Sixteen Dollars ($66,830,916).

Signed this 27th day of May, 2008.

/s/
MICHAEL C. FLANAGAN
Associate District Judge

APPENDIX D
IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA DIVISION III

CASE NO. 106,470

NANCY FULLER HEBBLE AND SUSAN FULLER MALEY, AS INDIVIDUALS; NANCY FULLER HEBBLE AND SUSAN FULLER MALEY, AS CO-TRUSTEES OF THOMAS R. FULLER TESTAMENT TRUST; WACHOVIA BANK, N.A., AS EXECUTOR OF THE ESTATE AND TRUST OF ELIZABETH FULLER GARDNER TRUST; AND MARSHALL T. STEVES, TRUSTEE OF THE DINGS TRUST AGENCY,
Plaintiff/Appellees,

vs.

SHELL WESTERN E & P, INC., AND SHELL OIL COMPANY,
Defendant/Appellants.

(JANUARY 26, 2010)

ORDER

Appellants' Petition for Rehearing and Brief in Support, filed January 7, 2010, is DENIED.

DONE BY ORDER OF THE COURT OF CIVIL APPEALS IN CONFERENCE this 25th day of January, 2010.

/s/
CAROL M. HANSEN
Presiding Judge

APPENDIX E
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MONDAY, APRIL 12, 2010

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

106,002 Faust Corporation, an Oklahoma Corporation v. Tracy Stanfield by his Guardian Mildred Stanfield

Petition for certiorari is denied.

ALL JUSTICES CONCUR

106,199 State of Oklahoma, ex rel Department of Transportation v. Rick's Convenience, Incorporated, et al

Petition for certiorari is denied.

ALL JUSTICES CONCUR

106,470 Nancy Fuller Hebble, Susan Fuller Maley, as individuals, et al v Shell Western E & P, Inc., et al

Petition for certiorari is denied.

CONCUR: Edmondson, C.J., Hargrave, Opala, Watt, Colbert, Reif, JJ.

DISSENT: Taylor, V.C.J., I would grant certiorari to give a full and meaningful *de novo* review of this punitive damages award under the *State Farm v. Campbell*, 538 U.S. 408 (2003), guideposts and factors. That review should also include a complete

examination of the issue of due process in the award of these punitive damages.
Winchester (joins Taylor, V.C.J.), J.

NOT PARTICIPATING: Kauger, J.

106, 488 Jerry Bryant v. Connie Bryant

Petition for certiorari is denied.

ALL JUSTICES CONCUR

106,523 (Comp w/106,524 & 106,525) Frank Combs v. Helen K. Combs

Petition for certiorari is denied.

ALL JUSTICES CONCUR

/s/

CHIEF JUSTICE

APPENDIX F
IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

THURSDAY, APRIL 15, 2010

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

106,470 Nancy Fuller Hebble, et al v. Shell Western E& P, Inc., et al

Appellants' motion to suspend effectiveness of mandate is granted. Mandate will timely issue upon conclusion of appeal, including pending motions but its effectiveness will be suspended until expiration of time to file petition for certiorari or disposition of petition if filed.

107,350 The State of Oklahoma, ex rel Craig Ladd, District Attorney v. $457.02 in U.S. Currency and Embry Jay Loftis

The court notes no appellant's brief in chief has been filed according to docket of this Court. Appellant must file brief or appeal will be dismissed.

107,657 Rusty D. Weathers v. Jennifer L. Weathers

Motion to file amended designation of record is granted provided that amended notice of completion of record is filed by May 1, 2010. Appellant's brief in chief shall be filed by May 14, 2010. This time limit will not be extended.

108,104 Melody Sue Kosechequetah, now Figuera v. Dustin Kosechequetah

Controversy regarding contents of narrative statement must be resolved in trial court. Narrative must be approved and filed in trial court in time for inclusion in record and notice of completion of record due September 7, 2010.

108,186 In the Matter of the Estate of Inez Nix, aka Earnest Inez Nix

The Oklahoma Department of Wildlife Conservation v. Carlos A. Williamson

108,188 In the Matter of the Estate of Inez Nix, aka Earnest Inez Nix, Deceased Carlos A. Williamson, Personal Representative v. State of Oklahoma, ex rel The Oklahoma Department of Wildlife Conservation, Testament Beneficiary

Appeals from same trial court proceeding are consolidated under surviving appeal #108,186.

/s/

CHIEF JUSTICE

APPENDIX G
IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

(October 1, 2009)

The following cases are assigned to the Court of Civil Appeals Oklahoma City, Divisions 1 and 3. The judges serving in the Oklahoma City Divisions are Carol M. Hansen, Larry E. Joplin, Kenneth L. Buettner and E. Bay Mitchell, III and Robert Dick Bell. The judges sit in three-judge panels which rotate periodically, but all assigned cases will be decided by three of the above named judges. Any party may seek disqualification of any judge pursuant to Okla. Sup. Ct. R. 1.175, 12 O.S. 2001, Ch. 15, App. 1 and 20 O.S. 2001 §§ 30.3, 1401 and 1402.

106,470 Hebble et al v. Shell Western E & P

106,544 D.O.T. v. Williams et al

106,573 James R. Vannoy et al v. RM Luna

106,602 Rogers v. Alizadeh-Fard

107,255 Stephens v. Oklahoma Highway Patrol et al

107,289 Guzman v. J & J Tree Services LLC et al

The proceedings are to be governed by Oklahoma Supreme Court Rules, Part V, Appeals Assigned to Court of Civil Appeals. 12 O.S. 2001 Ch. 15, App. 1. Until the Court of Civil Appeals has made its final disposition, all motions, petitions and other paperwork shall be filed with the Clerk of the Supreme Court who serves *ex officio* as the clerk of the Court of Civil Appeals room B-2, State Capitol, Oklahoma City, Oklahoma, 73105.

DONE BY ORDER OF THE SUPREME COURT
THIS 1ST DAY OF OCTOBER, 2009.

/s/

CHIEF JUSTICE

APPENDIX H
IN THE DISTRICT COURT OF STEPHENS COUNTY STATE OF OKLAHOMA

CASE NO. CJ-95-234L

NANCY FULLER HEBBLE, SUSAN FULLER MALEY, AS INDIVIDUALS; NANCY HEBBLE AND SUSAN MALEY, AS CO-TRUSTEES OF THOMAS R. FULLER TESTAMENTARY TRUST; WACHOVIA BANK, N.A. AS EXECUTOR OF ESTATE AND TRUSTEE OF ELIZABETH FULLER GARDNER TRUST; MARSHALL T. STEVES, TRUSTEE OF THE DINGS TRUST AGENCY,

Plaintiffs,

v.

SHELL WESTERN E & P, INC., AND SHELL OIL COMPANY,

Defendants.

(JUNE 11, 2008)

DEFENDANTS' MOTION FOR REMITTITUR OR FOR NEW TRIAL

Defendants, Shell Western E & P, Inc. ("Shell Western") and Shell Oil Company ("Shell Oil") (sometimes collectively referred to herein as "Shell"), pursuant to 12 O.S. § 651 and U.S. Const. Amend. XIV, move the Court to grant a remittitur of both punitive and actual damages. In the alternative, Shell requests that this

Court grant a new trial. Shell seeks this relief on the following grounds:[1]

MOTION FOR REMITTITUR

Excessive Punitive Damages

* * *

2. The punitive damages are grossly excessive in violation of Defendants' substantive due process rights under the Due Process Clause of U.S. Const. Amend. XIV. *See Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007); *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408 (2003). The three guideposts for determining the constitutionality of a punitive damage award, with the most important factor being the first, are: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff, and the punitive damages award; and (3) the difference between the punitive damages awarded and the civil penalties authorized under state law for comparable conduct. *See Campbell*, 538 U.S. at 418. Under these guideposts, the punitive damage award is unconstitutionally excessive considering the nature of Defendants' conduct and the lack of a reasonable relation of the amount of the award to the harm to the Plaintiffs, and when compared to civil penalties under Oklahoma law for comparable conduct.

a. With respect to reprehensibility, the harm caused was economic as opposed to physical; there was no evidence that Defendants' conduct evinced an indif-

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[1] This Motion is timely filed within ten days of the filing of the judgment, pursuant to 12 O.S. §§ 653 and 2006(A)(1). Shell also filed on this same date a Motion for Judgment and for Judgment Notwithstanding the Verdict. This Motion for Remittitur or for New Trial need not be considered should Shell's Motion for Judgment and for Judgment Notwithstanding the Verdict be granted.

ference to or a reckless disregard of the health or safety of others; there was no evidence that Defendants were aware that any Plaintiff was financially vulnerable; and the conduct complained of was the failure to properly account and pay net profits that were agreed upon in a contract. *See FDIC v. Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997) ("... the fact that NationsBank's conduct here was non-violent makes it less reprehensible."); *Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470, 487 (6th Cir. 2007) ("In this case where only one of the reprehensibility factors is present, a ratio in the range of 1:1 to 2:1 is all that due process will allow.").

b. With respect to the second factor, the award must be both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. *Campbell*, 538 U.S. at 426. Here, the award is neither reasonable nor proportionate to the general damages recovered, given the fact that Plaintiffs' loss was purely monetary, and there was a substantial award of interest that was penal in nature. When prejudgment interest is excluded from the comparison of punitive damages to actual damages (*see* paragraph 3(b) *infra*), the ratio of punitive damages to actual damages is 71.4:1. *See Bridgeport*, 507 F.3d at 488 ("The Supreme Court has made clear that '[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.") (quoting *Campbell*, 538 U.S. at 425); *Hamilton*, 122 F.3d at 862 (in ordering remittitur of $1.2 million punitive damage award of all amounts in excess of $264,000, the court stated: "When the injury is economic, and particularly when it arises out of a contractual relationship ... the permissible ratio of punitive

damages to actual damages should be relatively modest.").

c. The only civil penalty under Oklahoma law for comparable conduct is the penalty of 12% interest on the proceeds found to be due and owing provided by former 52 O.S. § 540. This penalty did not exist in this case until several years after the wells had been drilled and were producing. *Cf. Hamilton*, 122 F.3d at 862 ("Instead, the Hamiltons' fraud claim arises out of an alleged breach of contract which, under Oklahoma law, will only rarely sustain a tort cause of action. This suggests that NationsBank was not on notice that its conduct could give rise to substantial non-compensatory liability. Accordingly, this factor also drives us to conclude that the maximum constitutionally permissible ratio of punitive to actual damages is fairly low in this case.").

3. The award of punitive damages is in violation of Oklahoma law and also in violation of Shell's procedural due process rights guaranteed by U.S. Const. Amend. XIV because:

a. The Court refused to instruct the jury and to provide a verdict form, as requested by Defendants, that would allow the jury to make a determination of punitive damages as to each Plaintiff and each Defendant. *See* Defendant's Requested Instruction Nos. 12 and 33, and Defendants' Requested Verdict Forms. Instead, the Court required the jury find for or against all of the Plaintiffs and both Defendants and to award a single sum of punitive damages, as if the case were a class action. Each Plaintiff was required to establish entitlement to punitive damages against each Defendant. There was no

alter ego alleged or proved and there is no joint and several liability for punitive damages.[2]

b. The Court erred in allowing Plaintiffs' counsel to argue, over Defendants' objection, that the jury should award actual damages in the amount of four times the amount of actual damages awarded—including the prejudgment interest awarded—and in refusing to instruct the jury that they were required to exclude prejudgment interest in their consideration of the amount of punitive damages. *See Texas Health Enterprises, Inc. v. Geisler*, 9 S.W.3d 163, 169 (Tex. App. Fort Worth 1999) (court, in holding that in determining the cap on punitive damages prejudgment interest could not be included, stated: "Adding prejudgment interest to the actual damages award and then imposing the statutory cap on this aggregate amount yields the same result forbidden by the supreme court when it said prejudgment interest could not be awarded on [punitive] damages."); *Casto v. Arkansas-Louisiana Gas Co.*, 562 F.2d 622, 625-626 (10th Cir. 1977) (court, applying Oklahoma law, held that prejudgment interest is not allowed on an award of punitive damages).[3]

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[2] *See Gallegos v. Citizens Ins. Agency*, 108 N.M. 722, 779 P.2d 99, 105 (1989) (punitive damages awarded against two or more defendants must be separately determined as to each defendant); *U.S. Indus. v. Touche Ross & Co.*, 854 F.2d 1223, 1261 (10th Cir. 1988) (liability of defendants on claims for common law fraud and punitive damages is several and independent only); *Shields v. Martin*, 109 Idaho 132, 706 P.2d 21, 27 (1985) (liability for punitive damages is not joint and several); *Embrey v. Holly*, 293 Md. 128, 442 A.2d 966, 973 (1982) (award of punitive damages should be apportioned between multiple wrongdoers "depending upon the degree of culpability and pecuniary status of each.").

[3] Prejudgment interest must be authorized by statute. *See Majors v. Good*, 1992 OK 76, 832 P.2d 420, 422. Punitive damages are not

If pre-judgment interest is excluded from the amount of punitive damages awarded, the ratio of punitive damages to the amount of actual damages awarded is in excess of 74:1. By allowing the jury to consider pre-judgment interest in determining the ratio of punitive damages to actual damages, the Plaintiffs were allowed to recover prejudgment interest five times over, resulting in an impermissible multiple penalty.[4]

c. The Court's Instruction No. 1 in the Second Stage of the Trial erroneously instructed the jury that they could award punitive damages if they found fraud. This instruction was erroneous because the jury had already found fraud, and had done so under an erroneous and less stringent burden of proof than that required by law. *Cf. Lenn v. Miller*, 1965 OK 86, 403 P.2d 458, 462 (court affirmed an award of actual damages for fraud but reversed the judgment for punitive damages, finding that the circumstances of the case did not show "the aggravating circumstances for such gross negligence and indifference as to amount to evil intent on the part of defendant to sustain exemplary damages."). *See also Hamilton v. Amwar Petroleum Co.*, 1989 OK 15, 769 P.2d 146, 149.[5]

d. The elements of fraud and definition of fraud contained in Jury Instruction No. 1 do not set forth the

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compensatory in nature and there is no statute authorizing an award of prejudgment interest on punitive damages in Oklahoma.

[4] The $13,205,916.00 actual damages awarded by the jury consisted of $750,695.00 as the principal sums due and owing, and $12,455,221.00 in prejudgment interest.

[5] In order to warrant punitive damages, "'The act which constitutes the cause of action must be activated by or accompanied with some evil intent, or must be the result of such gross negligence—such disregard of another's rights—as is deemed equivalent to such intent.'" *Newport v. USAA*, 2000 OK 59, ¶ 50, 11 P.3d 190, 204, quoting *Slocum v. Phillips Petroleum Co.*, 1983 OK 112, 678 P.2d 716, 719.

requisite elements of fraud. The court's instruction that the jury could find fraud and award punitive damages from a pattern of conduct of purported concealment is contrary to law and the evidence, and deprives Defendants of their right to due process of law. *Cf. Austin v. Cockings*, 1994 OK 29, 871 P.2d 33, 35 ("Use of the terms 'false suggestions' [in jury instruction on elements of fraud] could easily have mislead the jury resulting in an unfair trial . . . .").

e. The Court erred and deprived Defendants of their right to procedural due process by failing to instruct the jury, as requested by Defendants, that a breach of contract or mere mistake or error, even if negligent does not constitute malice, as requested by Defendants. *See* Defendants' Requested Instruction No. 33. *See also Ruth Fuel Co. v. Nichter*, 1935 OK 1134, 51 P.2d 502, 504 (trial court ended by refusing to provide the defendant's requested instruction pertaining to punitive damages, which would have advise the jury "that if the evidence failed to show the defendant guilty of conduct justifying the exemplary damages, that then and in that event the plaintiff would not be entitled to recover exemplary damages. . . . This court has held repeatedly that it is error for the court to refuse a requested instruction properly drawn and presenting defendant's theory to the jury.").

f. The Court erred and deprived Defendants of their due process rights by failing to instruct the jury as to the factors that the jury could consider in determining the gravity or reprehensibility of the Defendants' conduct, as requested by Defendants. *See* Defendants' Requested Instruction No. 33.

g. The Court committed prejudicial error and violated Defendants' due process rights by allowing

Plaintiffs to introduce into evidence, over Defendants' objection, a formula for determining the amount of punitive damages, which was based solely on Shell Oil's financial condition and did not take into account any other factor. *See Voilas v. GMC*, 73 F. Supp. 2d 452, 463-464 (D.N.J. 1999); *Hayes v. Wal-Mart Stores, Inc.*, 294 F. Supp. 2d 1249, 1250-1251 (E.D. Okla. 2003); *Burton v. Wyeth-Ayerst Labs. Div. of Am. Home Prods. Corp.*, 513 F. Supp. 2d 708, 716 (N.D. Tex. 2007). The reprehensibility of the conduct is the most important factor to examine in determining the constitutionality of a punitive damage award. "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 538 U.S. at 427. Further, "the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Id.* at 417 (internal quotation marks and citation omitted).

4. As discussed in the next section, a substantial remittitur of actual damages should be ordered. Such a remittitur of actual damages would require a remittitur of punitive damages so that any punitive damages bear a reasonable relation to the actual damages. *See Frank v. Mayberry*, 1999 OK 63, ¶¶ 29-30, 985 P.2d 773, 777.

5. There was no clear and convincing evidence of the conduct warranting an award of punitive damages and, therefore, a remittitur should be ordered of the amount of punitive damages in excess of the amount of the actual damages awarded. *See* 23 O.S. (1991) § 9.

* * *

APPENDIX I

IN THE DISTRICT COURT OF
STEPHENS COUNTY
STATE OF OKLAHOMA

CASE NO. CJ-95-234L

NANCY FULLER HEBBLE, *ET AL.*,
Plaintiffs,

v.

SHELL WESTERN E & P, INC., *ET AL.*,
Defendants.

(JULY 2, 2008)

DEFENDANTS' SUPPLEMENT TO MOTION FOR REMITTITUR OR FOR NEW TRIAL

Defendants, Shell Western E & P, Inc. and Shell Oil Company, supplement their Motion for Remittitur or for New Trial filed in this case on June 13, 2008, with the case of *Exxon Shipping Co. v. Baker*, No. 07-219, which was decided by the United States Supreme Court on June 25, 2008. A copy of that decision is attached hereto as Exhibit "A". Defendants seek judgment notwithstanding the verdict in their favor on Plaintiffs' claim for punitive damages. Alternatively, the *Exxon* decision supports a remittitur of punitive damages to an amount less than the amount of actual damages, as was done in the cases cited by Defendants in their Motion for Remittitur or for New Trial. *See Chandler v. Denton*, 1987 OK 38, 741 P.2d 855 (remittitur ordered under which the ratio of

punitive damages to actual damages was approximately 0.42:1); *American Nat'l Bank & Trust Co. v. Bic Corp.*, 1994 OK CIV APP 70, 880 P.2d 420 (remittitur ordered under which the ratio of punitive damages to actual damages was approximately 0.57:1).

1. In *Exxon*, the Court reviewed an award of $2.5 billion in punitive damages (after a remittitur ordered by the Ninth Circuit Court of Appeals), in a case arising from the spill of 11 million gallons of crude oil into Prince William Sound, which the Court characterized as a "disaster". The Exxon disaster was massive, impacting thousands of people, destroying businesses, killing wildlife, and injuring the environment. The lawsuit involved a punitive damage class of 32,000 people. *See* Exhibit "A" at page 23, n. 6. Nevertheless, the Court, in fashioning federal common law, found that it would not be appropriate for the punitive damages to exceed the amount of relevant compensatory damages, which was found to be $507.5 million.

2. The Court in *Exxon* relied on the fact that in state court cases the median ratio of punitive damages to compensatory damages is just 0.62:1, meaning that compensatory damages exceeded punitive damages in most cases. The Court was critical of punitive damages that exceeded this ratio because of their "stark unpredictably," with one study showing that "fully 14% of punitive awards in 2001 were greater than four times the compensatory damage," and another study of "financial injury" cases "found that 34% of the punitive damage awards were greater than three times the corresponding compensatory damages." Exhibit "A" at p. 15. The Court stated that the available data suggested that these variations in punitive awards were not based upon rea-

soned judgment and that the awards, instead, were inconsistent, unpredictable, and unfair.

3. The Court held that a "quantified approach" would best render punitive damages fair and reasonably predictable. Exhibit "A" at 16-18.[1]: The Court found that "a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped." *Id.* at 21. The Court concluded:

> Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.

Id. at 21. The Court noted that in connection with the outermost limit of punitive damages in the context of the Due Process Clause:

> "[W]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensa-

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[1] The Court stated:

> Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another. Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another. . . . The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances.

Id. at p. 16.

> tory damages, can reach the outermost limit of the due process guarantee."

Id. at p. 16, quoting *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

4. As pointed out by the Court in footnote 12 of its opinion, some states, including Oklahoma, have imposed limits on the size of punitive damage awards. However, the Oklahoma statute cited in the *Exxon* opinion was adopted in 1995, with an effective date just nine (9) days after this lawsuit was filed, and the statute did not apply retroactively to this case. *See* Okla. Stat. tit. 23, § 9.1. The Legislature, by adopting § 9.1, expressed its concern with the size of punitive damage awards.[2]

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[2] Under Okla. Stat. tit. 23, § 9.1 the jury is required to find that there is clear and convincing evidence of the type of conduct warranting an award of punitive damages. Under § 9.1, punitive damages are limited to (1) the greater of the amount of compensatory damages awarded or $100,000 in cases involving "reckless disregard"; or (2) the greater of twice the compensatory damages awarded or $500,000, or the increased financial benefit derived by the defendant as a direct result of the defendant's conduct giving rise to punitive damages in cases involving intentional and malicious conduct. Punitive damages are unlimited only where the jury has found clear and convincing evidence that the defendant's conduct was intentional and malicious and the court has found, outside the presence of the jury, that "there is evidence beyond a reasonable doubt that the defendant acted intentionally and with malice and engaged in conduct life-threatening to humans." Okla. Stat. tit. 23, § 9.1.

APPENDIX J
IN THE DISTRICT COURT OF STEPHENS COUNTY STATE OF OKLAHOMA

CASE NO. CJ-95-234L

NANCY FULLER HEBBLE, SUSAN FULLER MALEY, AS INDIVIDUALS, NANCY HEBBLE AND SUSAN MALEY CO-TRUSTEES OF THOMAS R. FULLER TESTAMENTARY TRUST, WACHOVIA BANK, N.A. AS EXECUTOR OF ESTATE AND TRUSTEE OF ELIZABETH FULLER GARDNER TRUST; MARSHALL T. STEVES, TRUSTEE OF THE DINGS TRUST AGENCY,

Plaintiffs

VS

SHELL WESTERN E & P, INC. AND SHELL OIL COMPANY,

Defendant.

Transcript of Defendant's Motion for Summary Judgment, Judgment Notwithstanding the Verdict and Motion for Remittitur or New Trial hearing held on Monday, August 18, 2008, before the Honorable Michael C. Flanagan, Associate District Judge, at the Cotton County Courthouse.

APPEARANCES:

MR. CLARK O. BREWSTER, ESQ. and MR. GUY A. FORTNEY, ESQ., Attorneys at Law, 2617 E 21st

Street, Tulsa, Oklahoma 74114, appearing on behalf of the Plaintiffs.

MR. RANDALL K. CALVERT, ESQ., Attorney at Law, 1041 NW Grand Boulevard, Oklahoma City, Oklahoma 73118, appearing on behalf of the Plaintiffs.

MR. R. BRAD MILLER, ESQ., Attorney at Law, 920 North Harvey, Oklahoma City, Oklahoma 73102, appearing on behalf of the Defendant.

MR. GREG MCKENZIE, ESQ., Attorney at Law, 19100 Saddle River Drive, Edmond, Oklahoma 73012, appearing on behalf of the Defendant.

* * *

[2] PROCEEDINGS

THE COURT: The court will call the case of Nancy Fuller Hebble, et al., versus Shell Western E & P and Shell Oil Company, Case No. CJ-95-234L. The matter comes on today upon several matters, the defendant's motion for judgment as a matter of law and judgment not withstanding the verdict, and I believe it's motion for remittitur or for new trial; is that correct?

MR. MILLER: Yes.

* * *

THE COURT: All right. Since these are the defendant's motions, I'll permit the defendant to go forward.

* * *

[3] MR. MILLER: * * * One of the things that I kind of agree with [4] was that, you know, the legislature apparently felt pretty strongly about the idea that even when an oil company mistakenly fails to pay interests that are due, that they are going to heighten their incentive to make sure they don't let that happen; that they're going to tag them with a 12 percent compounding

interest rate that is far greater than what they would be subject to in, as far as I know at least, any other area of the law. There may be some others I'm unfamiliar with, but the bottom line is it's unusual. I mean I'm not saying that it supplants punitives. I know that's not the way the law is here in Oklahoma, but you could certainly easily call it penal or punitive to some degree because it is more onerous on the company or entity failing to pay than what it would be had they suspended it or, you know, got it right.

Now, if you keep that in mind, that penal sort of interest rate is for violation of that. There's got to be a violation of that act. * * *

* * *

[7] THE COURT: Let me ask you what you're asking me to do about it. Let's assume—let's take your argument to its conclusion, and let's say that they failed to submit that; that the interest on actual damages should not have been determined the way it was because of the failure to submit the 540 issue to the jury. Are you saying then that the amount of actual damages should have been what the actual production was plus what?

MR. MILLER: I think it's 23 OS 9.

THE COURT: 23 OS 9. Okay.

MR. MILLER: There's a section that actually talks about how interest is calculated, and let's take the breach [8] of fiduciary duty. It does not need to be said today, I hope, our position on fiduciary duty in the matter, but we know that even if you believe and agree with the arguments we've made in all our papers, we know we are left with—we are left with a breach of fiduciary duty based on the Court's pretrial ruling and so there would be a $750,000 component. It would be subject to 6 percent

simple interest. It's simple math, and I think we did an estimate in there for you, but it would be a couple million dollars total.

* * *

[12] MR. MILLER: * * * [14] There can surely be no question that the wonderful argument made in the second stage by Mr. Brewster that based the number that ultimately the jury shot at and came to was largely dependent on the actual and 12 percent compounding interest award that the jury found. I mean it was discussed in the evidence. It was discussed in the argument. It was important not to mention that if it's a two million dollar verdict, if that's right, we're talking about a ratio of astronomical, like 27:1. I mean if we're going to get into the whole—what the Court's doing right now with punitives and all that discussion, it's way out of line. By the way, one other thing on that. I mulled over in my head a lot since I heard the traffic ticket analogy trying to figure out about that, and it sounds so nice. We all become so desensitized to traffic tickets. It's just part of everyday life, and when you get one you gripe about it, try to get out of it when you can't pay the fine. But there's a reason that they're different than what we're talking about in this case, I suggest.

First of all, even at two million dollars, the plaintiffs under the Oklahoma law except for 540, by law have been fully compensated, No. 1. Traffic ticket's an up front [15] fine, but a traffic ticket is designed to accomplish something. A traffic ticket's designed to prevent violent accidents. A traffic ticket's designed to keep everybody in check in going the speed limit. That's what it's for, okay. And all I'm suggesting to you, Judge, is the analogy to a crime that is designed to avoid violent consequences is pushing through the roof the jurors'—I mean it kind of

made sense, but pushing through the roof the jurors' idea about what ought to be done. It's all blue sky money, Judge. It's all blue sky money at this point.

THE COURT: To kind of sum up, Mr. Miller, your position on the—I mean this is in the simplest terms, on the fraud claim the failure to give a clear and convincing instruction is fatal, and on the breach of fiduciary duty claim, since there was no separate 540 instruction or action argued by the plaintiffs, no verdict rendered on 540, that the interest on the actual damages even if you concede for a minute, which you don't, but if you concede there was a breach of fiduciary duty is somewhere in the neighborhood of 750,000 plus 6 percent simple interest which amounts to two million, somewhere in that neighborhood.

MR. MILLER: Yes. And the punitives, I would suggest, because this is blue sky money and because these people have full competency under the law except for your interpretation of 540 would be a 1:1 ratio. That's what I [16] would suggest. So we're talking about four million dollars and, Judge, this case goes away.

THE COURT: I didn't mean to oversimplify all this fine legal work that went into these multi-page briefs, but that's a pretty serious argument that you've made and, you know, aside from all the details.

* * *

[25] MR. BREWSTER: On 540, Your Honor, Mr. Miller suggests that it's punitive or a penalty in nature. For much of the '70s and '80s when interest rates for mortgages was 14, 15 and some instances 18 percent, the percentage of interest applied to unpaid production funds was 6 percent. So if we would have taken the regular interest rate rather than having a statutory mandated

rate, these folks would have done better. It's not a penalty. It is a detriment, because [26] I certainly remember and, Your Honor, we can provide some tables for you, interest rates in the '70s and '80s many times were 16, 17, 18 percent while this particular company got the benefit of only paying 6 percent simple. It's not punitive. As a matter of fact, it was attempted to level the scales and provide a fair rate to those people that weren't receiving production payments. Now, if an oil company wanted to avoid that particular percentage, they could escrow the money and get a lower rate.

THE COURT: I agree with you.

MR. BREWSTER: The issue there is this, and this pivots on the fact that came into the courtroom, they admitted they knew it. They admitted at some point in time they recognized their mistake and they still didn't escrow it. So what I'm saying, Your Honor, it's hard to hear them complain now about a 12 percent rate when, in fact, they held it within their own decision making not to escrow the funds. Even after the lawsuit was brought they could have escrowed, they did not.

* * *

[29] THE COURT: The only other question I got for you, and it was a substantial supplemental motion by the defendants about the remittitur argument on the punitive damage amount. Do you have anything to say about that?

MR. BREWSTER: Sure. And I'm going to incorporate, since this is free reign argument, a former Supreme Court justice that I consulted in this case, and I said, "What do you think of this?" He said, "You're fine." I mean, you're fine on this because—

MR. MILLER: Put him on the stand. I want to cross examine him.

MR. BREWSTER: And the reason you're fine on this is you're within the 4 rule. You're even actually lower, and that's why I only asked the jury for what I asked for because we had a memo on point with regard to punitive damages, and the memo said try not to get past 10. Try to say in the 4, 5, 6 range, but you're good up to 10. I didn't even ask for that. I tried to keep around that 4.

THE COURT: Well, what if Mr. Miller's interpretation is correct and the 540 question not going to the jury results in a 6 percent simple interest calculation and we're talking about 2 million instead of 13 million? Then would the punitives be excessive?

MR. BREWSTER: One could argue that they were [30] outside the 4, 5, 6 range. I still think we're okay. The Supreme Court, as you've seen in the cases that we discussed, have approved 8, 9 and 10. I think at this point in time we've all worked very hard, this Court incredibly hard. It's up to the next level to tell us where we are. Judge, you've labored over a lot of these decisions. You've made the call. It's kind of like the umpire at the plate. We can talk about the game at the bar, but it doesn't make a whole lot of difference. You've made the call, and the jury made the call and wasn't even close. We can try this case again on this error. I don't think—other than spending a lot more time of this Court and these lawyers and another 45 people or whoever we inconvenienced, we're going to be in the same situation. It's time to try to get some resolution and have the Court tell us—I think they're going to commend us on the way we've tried this case on all sides. Judge, we've just got to let it rock on up the way.

* * *

[33] THE COURT: Mr. Fortney, are you going to make your point through Mr. Brewster here? You were wanting to say something.

MR. FORTNEY. I didn't know when you asked about [34] the supplemental brief if you wanted to talk specifically about Exxon.

THE COURT: That's what I was talking about.

MR. FORTNEY: Okay. I can respond to that, if you would like.

THE COURT: Well, Mr. Brewster basically said that his—and we're talking about remittitur here.

MR. BREWSTER: Right.

THE COURT: That if Mr. Miller's argument is taken as correct, that the punitives might be excessive. If I don't follow his argument, then we're within the realm of acceptability and that a remittitur—I mean that the punitives are not necessarily excessive.

MR. FORTNEY: Well, he goes farther than I would have gone. I would say even at that ratio you're still okay. We've gone through the cases and did an exhaustive search of the law, and there were many cases that were not remitted back that evidence a 500:1 ratio, 150:1 ratio, a 96:1 ratio. So, you know, the thing as I read BMW Gore, the Exxon case and the progeny that BMW Gore sites, it is a very fact sensitive analysis and you can find cases across the board that justify almost any ratios.

THE COURT: Well, that's what I was going to ask you. We're talking about what the amount should be, not—I mean I don't care about ratios except to the extent that the [35] Court—the Supreme Court has said, look, here's the guideline. You need to kind of look at that, but I'm wanting to make sure that the amount awarded under the facts of this case and with considering the proper

evidence—Mr. Miller points out that the jury considered the interest calculation that brought the actual damage award up to 13 million and some change—

MR. FORTNEY: I would agree.

THE COURT: —to get to the figure that they got to on the punitives and that was in error, that that was—

MR. FORTNEY: Actually, no, that is not what occurred in the closing argument in the punitive damages phase. The 13.2—when you look at it in hindsight, you can say, okay, it's 4:1 or what did we say? It's actually 4.06:1 between the two, but that wasn't what occurred during the punitive damage of the phase trial. The calculation that was done to get to that number was the speeding ticket analogy, and the point .0075 of what the net income was in the last year. That's the calculation. At no point in time—I never heard it—was any mention to what you should do is look at 4:1, 13.2. The 13.2, and I paid very careful attention, was not mentioned in the punitive damages closing argument part of the trial.

THE COURT: Let me ask you this: If the actual had been two million, do you think the jury would have picked 53 [36] million punitives?

MR. FORTNEY: Yes.

THE COURT: Okay.

MR. FORTNEY: And the reason is is because they liked the speeding ticket analogy that Mr. Martin asked for. They wanted a fine. We gave them a calculation for a fine, and they gravitated to it. The 13.2, and the record will reflect, was not mentioned at any time during the punitive damages phase of the trial. Now, obviously in hindsight you can look at it and say the ratio would be different of those two. That's a simple calculation, but the 13.2 was not relied upon by this jury to get to that

calculation, and in conversations with the jurors after the verdict they didn't even give us what we asked for. They actually added to it. What they said it was a 10:2 situation. One person wanted to give none and the other person wanted to double it so they compromised and came up with a different number. But the 13.2 came nowhere into that calculation so I think they're fine on that. It is not a factor of that.

THE COURT: Since you're at the podium, and Mr. Miller hasn't objected to this world wrestling federation tag team—

MR. MILLER: Well, Judge, you invited them to come up. What am I supposed to say?

THE COURT: I actually thought he was going to give [37] it to Mr. Brewster, and we'd continue that way but he did the tag off.

MR. FORTNEY: He tagged and ran back to the table.

THE COURT: If this is any compliment to you, Mr. Miller, I feel like you could probably take them both on. I'm not worried about that. Let me ask you about one other thing since you're up here. I didn't get a chance to ask Mr. Brewster. I don't know if Mr. Miller brought it up, but it was in their briefs and that is the punitive award being affected by the passions or higher passions of the jury. I know what you're going to say but, you know, based on what his argument was on actuals, were they based on the arguments? Did they, do you think, act over passionately and overreact? I know you think the ratio amount is fine, but if they were sitting there, and they just were considering everything without you lawyers trying to convince them to make it one way or the

other, was that amount inspired by passion or was it inspired by reason, in your judgment?

MR. FORTNEY: Of course I'm going to say, and I truly believe, it's inspired by reason. I sat through the trial, listened to the evidence. We were somewhat slack jawed at the presentation of evidence given by the defendants throughout much of the case. They came up and while the teacher's in the room, the jury, they sit there and they want to be meek and they want to show themselves to be we're so [38] sorry. We've looked back now, and we realize that we did owe you money and that you do have a right to this money. We just wish you would have sued us earlier. That was the defense at trial. All this other stuff that's in the brief wasn't presented at trial.

It was a statute of limitations defense. We talked about that at the close of evidence. So, you know, when the jury sits there and listens, and I think, Judge, as Mr. Garrison's demeanor, listens to Tahita Doyle tell how she found it and gave notice of it, and they don't do anything and they sit there and lie behind the log and litigate for ten years. Then on cross-examination with Mr. Brewster when asked what is it you want to do, do you want to keep the money? Mr. Garrison finally answers that's what we wants to do. I think that they saw the actions of Shell here. I think the punitive damage was a just. They were trying to hide the ball. They had been doing it for ten years and they finally got caught.

THE COURT: Are you done?

MR. FORTNEY: Well, if there's something—I came up to give Mr. Brewster a case or two. If there's something you want me to respond in Exxon, I'll be happy to do that.

THE COURT: Do I have all of them?

MR. FORTNEY: You have all the cases.

THE COURT: Well, just give me your nut shell [39] version of how you think Exxon affects this.

MR. FORTNEY: I clearly, and as I state in the brief, I don't think it affects it at all. The case was interesting, and when it came down we were all very concerned about how would it affect this case and what would it do to this case. When you read the case very clearly, they go through some of the case law supporting a punitive damages verdict, but then they clearly say, look, this case does not represent the Supreme Court's opinion on due process analysis of punitive damages awards. That's what they're looking at here. Did the award violate due process substantively and procedurally? Those cases you have to look to BMW vs. Gore. What Exxon clearly stands for is that when you look at a Meritime case, which this case didn't involve anything like that, the limit's 1:1. We look at it on the facts of this, but this case does not raise any constitutional impropriety and Exxon stands for the same proposition that once you get outside above 4:1 and once you get above 10:1, you raise constitutional issues. This case doesn't get us there.

THE COURT: Okay. Thank you. Mr. Miller, you have the last word so they say. If you want to pass off to Mr. McKenzie back and forth I'll permit you.

* * *

[40] MR. MILLER: All right, Judge. The next little thing that I keep hearing about, the idea that there's not some passion here is a little hard to fathom when we know what's going on in the world right now. I mean, I'm not sure [41] there is a more difficult client to represent than an oil company right now, and as a matter of fact,

prices of gas at the time of this trial—I don't have to tell you—were reaching tremendous new highs. They were in the 3 and 4 dollar range, off in there, and you had to drive by a Shell station to get to the courthouse if you went down the main drag in Duncan.

It is incomprehensible to me that anybody could say that jurors as they discussed in voir dire who couldn't understand why the price of gas was what it was as we all wonder why it is like it is. It's incomprehensible to believe that when you couple that with the evidence and the punitives and the argument and the punitives that Shell was making astronomical amounts of money across the board, that the jury didn't connect to that. So to think that it wasn't influenced by that sort of—

THE COURT: Let me ask you something on that. So the jury was told that the evidence reflected that Shell's average income was 191 million dollars a day. That was a fact that was established. Are you saying, Mr. Miller, that the punitives should not have been based on that; that it should not have been a factor that was involved?

MR. MILLER: Am I saying that they did not have a right to present that evidence? Is that what you're asking me?

[42] THE COURT: Right.

MR. MILLER: Judge, I think that they had a right to present that evidence certainly under the rulings of the Court. They had a right to present the evidence. There was absolutely nothing we could say about it in light of the limitation efforts that were made and how they were ruled on, yes.

THE COURT: But do you think that had something to do with the jury's passions about awarding punitive damages knowing that figure, knowing Shell's income?

That's what you're talking about the price of gas and the astronomical figures that Shell was making. Do you think that played a big part in them maybe overreacting a little bit?

MR. MILLER: All I can say, Judge, is if it would have been my call, and I wasn't a litigant in the case, and I was having to decide and I was presented with the kind of astronomical daily figure—revenue—whatever it was—of course it would have influenced me. So we all base what's reasonable on our own expectation and idea and character and thought process. That's what we do and, yes, of course, and those numbers—people in our state except for maybe a very few, maybe some sitting at this table over here, except for a very few people, those numbers—you can't even get your hands around those numbers. It's impossible. And there's not a person that sat on that jury would have the first idea [43] about that kind of money in a lifetime, much less a day.

Now, I think it's interesting about this—Mr. Brewster called out his expert witness, a former Supreme Court justice that's gone unnamed that said, oh, you don't have to worry because you didn't break the 4:1 rule or however he put it. And then as soon as you put it back on him about it, if it was the lower end on the actuals, oh, it could have been four, five or six. Oh, by the way, even 27:1 is okay. You're not in trouble. Well, which is it? Is it what the expert Supreme Court justice former that we don't know who he is said or is it 27:1 or 700:1.?

THE COURT: Isn't it kind of—not kind of—but if punitives are awardable and the jury finds punitives, it has to be an amount—tell me what it should be.

MR. MILLER: Well, first of all, there's no question that there's a little paragraph in the Exxon case, as Guy mentioned, that indicates that this is about Maritime law,

but you read the rest of the case and it certainly sounds like they're talking about punitives generally. I don't know how you can read that case and not feel that this is what the Supreme Court of the whole United States is thinking about punitives. That's just one guy's opinion about reading it. But, Judge, that's a case where not only was it one of the worst ecological disasters caused by man in our time, all right, and not only did it affect hundreds and [44] hundreds of people negatively and all kinds of wildlife and the rest—I mean you read the case—but, Judge, there was bad action.

There was a company that should have known that the guy driving a tanker full of oil had a problem that was going unaddressed. Now, that's a whole different story. I don't know who's talking up here. They surely have to admit that's a different kind of case than we had. At worst nobody is physically harmed. No disaster is pending with what happened in this case. Even Mr. Brewster, as I recall—now, I'm basing this on just my memory, but I was impressed that he conceded this during the trial in the argument. I think he said something like this: For a long time it was a mistake or probably a mistake or words to that effect, and then focused on the mid '80s timeframe, which by the way is after Shell no longer owns this thing—any of this—that someone apparently figured it out. It's not just—it's not the guy that runs Shell that figures it out.

After all the examination of all the information in this case that has gone on for all these years and all these very good lawyers on the other side, Judge, it looks like that some people who are in clerical positions, not people with the authority to make decisions, after this piece is gone and sold out of the Shell portfolio figure out that something was wrong when they owned it. That is the

[45] culpability here. Now, you compare that—just compare that in terms that make sense and money that we can all comprehend, and this is not a 66 million dollar case unless, of course, you're an oil company that makes 190 million dollars a day.

THE COURT: Do you think the jury decided—is it possible that the jury decided in this case that Shell knew about the money that was due to the plaintiffs, knew they hadn't paid it and did nothing about it? Is it possible the jury concluded that based on that that they needed to send a clear message that that kind of thing is not acceptable?

MR. MILLER: Well, I think the only part of that—well, first, anything's possible. The only thing I'd ask you to consider when you add into that equation is this: When did the jury think that they figured it out? If the jury thinks they figured it out way earlier while Shell still owns it, then I think you got a different kind of culpability. But if the jury believes that they figured it out after it's gone, and it's the clerical folks that figured it out and they just do nothing about it because they don't want to hassle with it, then I think, Judge, 66 million dollars is outlandish if that happened.

THE COURT: Well, there's no question from the facts that Shell knew of this interest while they owned it.

MR. MILLER: Oh, you mean the net profits interest?

[46] THE COURT: Yeah.

MR. MILLER: There's no question that some people at Shell in some capacities knew about the net profits interest. I would never—if you think I was arguing that—

THE COURT: No, no, but they knew it. Now, you're saying they didn't know that they hadn't paid it?

MR. MILLER: Yes, that's what I was trying to say.

THE COURT: That's what I thought you were saying. I'm clear on what you're saying. Go ahead.

* * *

APPENDIX K
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CASE NO. 106470

NANCY FULLER HEBBLE, SUSAN FULLER MALEY, AS INDIVIDUALS; NANCY HEBBLE AND SUSAN MALEY, AS CO-TRUSTEES OF THOMAS R. FULLER TESTAMENTARY TRUST; WACHOVIA BANK, N.A. AS EXECUTOR OF ESTATE AND TRUSTEE OF ELIZABETH FULLER GARDNER TRUST; MARSHALL T. STEVES, TRUSTEE OF THE DINGS TRUST AGENCY,

Plaintiffs/Appellees,

VS.

SHELL WESTERN E & P, INC. AND SHELL OIL COMPANY,

Defendants/Appellants.

APPELLANTS' BRIEF IN CHIEF

Appeal from the District Court of Stephens County, OK,
No. CJ-95-234L
Honorable Michael C. Flanagan,
Association District Judge, Presiding
Action at Law for Actual and Punitive Damages

(JUNE 22, 2009)

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* * *

V. The improper punitive damages award requires a new trial or, at the least, should be remitted to a constitutional level.

Punitive damages amplify an award of actual or compensatory damages to punish and deter especially wrongful conduct. *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 432 (2001). Because they are such a powerful tool, due process requires careful appellate scrutiny before they are upheld. The $53,625,000 punitive damages award in this case was erroneous for several reasons. First, Defendants' conduct amounted only to a contractual breach, which does not give rise to punitive damages under Oklahoma law, no matter how it is characterized. Second, even if punitive damages were appropriate, the facts did not justify the trial court's decision to lift the legislative cap limiting most punitive damage awards to the amount of compensatory damages. Third, because an exclusive statutory penalty was available to Plaintiffs to redress a large part of their injuries, punitive damages should have been allowed on only a portion of the award, if at all. Fourth, the punitive damages award was distorted because of serious calculation errors. Fifth, even if uncapped punitive damages had been appropriate, the amount of the award violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, as construed in recent Supreme Court opinions.

In considering whether an award of punitive damages is unconstitutionally excessive, the U. S. Supreme Court generally looks to the "ratio" between compensatory and punitive damages, or the factor by which punitive damages compare with compensatory damages. *See, e.g., Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2624

(2008); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (ordinarily there should be no more than "a single-digit ratio between punitive and compensatory damages"); *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 580 (1996). To assess the ratio, of course, the validity of the compensatory damages award must first be determined. If the compensatory award is erroneous, or if the courts have wrongly categorized certain portions of the award as compensatory when they are not, then the actual ratio of punitive to compensatory damages will be higher than it first appears. The award below suffers from these infirmities. The trial judge erred in not recognizing the infirmities in his pre-trial and trial rulings and granting a new trial, or at the very least granting a substantial remittitur of punitive damages to correct for these errors.

A. Oklahoma law precludes punitive damages for the conduct Plaintiffs allege.

* * *

B. Even if punitive damages are permitted, they should have been capped.

* * *

C. Punitive damages should have been eliminated, or at least restricted, because the Legislature already provided an exclusive penalty.

Because Okla. Stat. tit. 52 § 540 already contains an exclusive punitive remedy, punitive damages should not have been part of this case, at least with respect to claims accruing after June 1980. *See supra* Section IV.C. During all relevant periods, the pre-judgment interest available under § 540 was explicitly identified as a "penalty." The Oklahoma Supreme Court has already explained as

much, labeling the interest that comes from § 540 as "interest qua penalty." *Fleet*, ¶ 11, 854 P.2d at 899. Oklahoma courts do not allow imposition of two penalties because that would amount to an impermissible double recovery. *See Wagoner v. Bennett*, 1991 OK 70, ¶ 12, 814 P.2d 476, 479 (a statutory remedy of double damages for residential tenants was "penal in nature," and "both punitive damages and double statutory damages are not recoverable by a residential tenant for the same" act); *see also Shirazi v. Childtime Learning Center*, 2009 OK 13, ¶ 10, 204 P.3d 75, 79 ("double recovery is never permitted").

D. Errors in calculating actual damages distorted the punitive damages award.

Even if punitive damages were appropriate, the trial court's errors in categorizing actual damages led to a greatly excessive punitive damage award. These errors require reversal of the entire punitive damages award, or at the very least a substantial remittitur.

First, when comparing the appropriate ratio of punitive to compensatory damages, the compensatory damages amount considered should not include pre-judgment interest. "Compensatory damages" are analytically separate from pre-judgment interest. *See, e.g., Guinn v. Church of Christ* 1989 OK 8, ¶ 11, 775 P.2d 766, 769 ("[t]he jury awarded $205,000 in actual and $185,000 in punitive damages; the trial court then added $44,737 in prejudgment interest"). The amount the jury wrote on the Verdict Form when fixing Plaintiffs' damages was, *to the penny*, the sum of the amounts of actual damages (*i.e.*, unpaid proceeds) and pre-judgment interest that Plaintiffs requested. If uncapped punitive damages are permissible at all on this record, they should be reviewed in comparison with actual damages exclusive of prejudg-

ment interest. As it stands, the ratio of punitive damages to actual damages for unpaid proceeds in the judgment is more than 71 to 1, far in excess of what is permissible under the Due Process Clause.

Second, even if some pre-judgment interest were properly part of compensatory damages, only a part of the interest awarded could be considered in assessing whether the ratio exceeded what is constitutionally permitted. Oklahoma law allows punitive damages only to the extent that pre-judgment interest is not itself punitive, since that would be impermissible under *Wagoner*. *See* 814 P.2d at 478-79. Whether Plaintiffs forfeited their rights to recover under § 540 or not, they cannot base a punitive damages recovery on interest that is already punitive. Even if some interest could arguably amount to "merely compensation for the use of money belonging to another," *Fleet*, ¶ 11, 854 P.2d at 899, such a rate can be no more than is necessary to adjust for the time value of money. Oklahoma law has fixed the rate necessary to that end—6% simple interest. Okla. Stat. tit. 23 § 6. Consequently, only prejudgment interest at the 6% compensatory rate would be appropriate to consider as part of compensatory damages for determining the appropriateness of an award of punitive damages. Even if only 6% interest had been considered part of compensatory damages in this case, the ratio would be reduced only from 71:1 to 19:1.[12] Because the trial court failed even to do this analysis, this Court should remand for a new trial, or at the very least should order a substantial remittitur.

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[12] $750,000 in actual damages plus $2 million in interest equals $2.75 million. Multiplying $2.75 million by 19 equals $52.25 million.

E. The punitive damages award in this case was excessive, in violation of the U.S. Constitution.

The Supreme Court of the United States holds that the Due Process Clause requires all lower courts, both federal and state, to review *de novo* the factual foundations of a punitive damages award. *Cooper*, 532 U.S. at 436 . The ordinary "deferential appellate review" of factual determinations is constitutionally inadequate in this area. *Id.* at 440. Thus, regardless of what the trial court did or failed to do, this Court must independently review the award.

The Supreme Court of Oklahoma has recognized and applied these principles both in cases, *see, e.g., Gilbert v. Security Finance Corp.* 2006 OK 58, ¶¶ 28-47, 152 P.3d 165, 176-80 (evaluating Oklahoma punitive damage rules through prism of recent U.S. Supreme Court cases), and in its supervisory authority over the courts, *see, e.g., In re Adoption of the 2008 Revisions to Oklahoma Jury Instructions Civil (Second Edition)*, 2008 OK 93, 2008 WL 4570620, *10-*11 (adopting revised jury instruction for punitive damages to take account of recent U.S. Supreme Court case law). Under these authorities, this award simply cannot withstand constitutional scrutiny.

In a series of cases beginning with *Gore*, the U.S. Supreme Court has established three primary tests to determine the constitutionality of a punitive award.

First, the single "'most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.'" *Campbell*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575). Reprehensibility turns on whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. In this case, the harm was not physical and did not relate to "health or safety". The claim was a simple contract claim arising out of accounting errors concerning a very confusing set of transactions in a pre-computer era and failure to properly track the entirety of the revenue generated by the interests at issue. Plaintiffs did not have "financial vulnerability"—unlike, for example, consumers violated by contracts of adhesion, they are well-represented owners of valuable oil-and-gas interests with diverse additional income sources. The failure to pay Plaintiffs did not constitute "repeated" intentional deprivations; the original failure to properly track the details of all the transactions inevitably led to a failure to pay every time a payment was due. Finally, far from showing "intentional malice, trickery, or deceit," the underlying conduct was a standard breach of contract, in which net profits were owed but not paid. There was no malignant heart or malicious intent, no running tally of the amount kept from Plaintiffs, and no plan to make them believe that production was less than it actually was. The U.S. Supreme Court has said that "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.* The conduct here cannot be labeled "reprehensible"

without draining all meaning from the word and ignoring the Supreme Court's guidance.

Second, the award is particularly suspect in this case because of the second test—identifying a proper "limi[t] on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *Id.* at 424. The Supreme Court has been cautious about "impos[ing] a bright-line ratio," *id.* at 425, but has stated that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* In this case, with punitive damages 71 times actual damages representing unpaid proceeds, or, 19 times actual damages representing unpaid proceeds plus a compensatory amount of prejudgment interest, the Court's standards plainly have been exceeded. Even without adjusting for these errors, the ratio awarded by the jury was about 4:1, which, if applied to compensatory damages, may be about the Constitution's limit. Indeed, several Supreme Court cases have identified business torts like those alleged here as likely limited to about 4:1. *See, e.g., Gore*, 517 U.S. at 581 ("In *Haslip* we concluded that even though a punitive damages award of 'more than 4 times the amount of compensatory damages' might be 'close to the line,' it did not 'cross the line into the area of constitutional impropriety.'" (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991)). Exceptions may be made if the economic harm is very small—the $4,000 harm in *Gore*, perhaps, would justify a higher ratio—but it is also true that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 424.

This 1:1 ratio is the most sensible maximum in this case. In *Campbell*, where the behavior was far more egregious than in this case (an insurance company refused to settle a case within policy limits, then after a foreseeable loss told an elderly couple to put their land up for sale to pay the judgment), the Supreme Court thought that the facts "likely would justify a punitive damages award at or near the amount of compensatory damages." 538 U.S. at 429. A 1:1 ratio in this case would match the Oklahoma cap which the trial court improperly lifted, and it would be consistent with the Supreme Court's most recent punitive damages case.[13]

Third, the Supreme Court looks to "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'" *Id.* at 428. The civil penalty most relevant to this case is, as the Oklahoma Supreme Court labeled it, the "penalty" that the high rate of compound interest authorized by § 540 provided. *See Fleet*, ¶ 11, 854 P.2d at 899. As described above, however, this amount—even as inflated by the trial court's retroactive application of the statute—is dwarfed by the amount of punitive damages awarded in this case.

Under these tests, the award of any punitive damages *at all* in this case is dubious, and the massive award given by the jury and accepted by the trial court is certainly improper. This Court should either eliminate the punitive award altogether, dramatically reduce the punitive

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[13] In *Exxon*, 128 S. Ct. at 2633, concerning the grounding of the *Exxon Valdez*, the Court decided "that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases." This ratio does not bind this Court. However, its analysis telegraphs the Court's independent and informative views on proper punitive damages limits.

award so that it fits within due-process limits, or reverse and remand for a new trial.

* * *

APPENDIX L
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CASE NO. 106470

NANCY FULLER HEBBLE, SUSAN FULLER MALEY, AS INDIVIDUALS; NANCY HEBBLE AND SUSAN MALEY, AS CO-TRUSTEES OF THOMAS R. FULLER TESTAMENTARY TRUST; WACHOVIA BANK, N.A. AS EXECUTOR OF ESTATE AND TRUSTEE OF THE ELIZABETH FULLER GARDNER TRUST; MARSHALL T. STEVES, TRUSTEE OF THE DINGS TRUST AGENCY,

Plaintiffs/Appellees,

VS.

SHELL WESTERN E & P, INC., AND SHELL OIL COMPANY,

Defendants/Appellants.

APPELLANTS' REPLY BRIEF

Appeal from the District Court of Stephens County, OK,
No. CJ-95-234L
Honorable Michael C. Flanagan,
Associate District Judge, Presiding
Action at Law for Actual and Punitive Damages

(SEPTEMBER 15, 2009)

* * *

IV. The punitive damage award must be reversed.

Plaintiffs attempt to defend one of the largest punitive damage awards in Oklahoma history by asking this Court to apply the wrong standard of review and by suggesting improper substantive standards. Under the *de novo* standard required by the U.S. Supreme Court, it is clear that the punitive damage award in this case is unconstitutionally excessive.

A. The trial court erred in lifting the cap on punitive damages.

* * *

B. This Court subjects punitive damage awards to *de novo* review.

Citing a 27-year-old case, Plaintiffs assert that "'[a] punitive damage verdict is peculiarly within the province of the jury and will not be casually interfered with on the grounds of passion or prejudice.'" (Plfs.' Br. 17, quoting *Timmons v. Royal Globe Ins. Co.*, 1982 OK 97, ¶ 44, 653 P.2d 907, 919) Since *Timmons* was decided, however, the U.S. Supreme Court has substantially altered appellate review of punitive damage awards, including requiring that such review be *de novo*. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). This Court "has not hesitated to reverse a punitive award" under the current *de novo* standard. *E.g., Gilbert v. Sec. Fin. Corp. of Okla., Inc.*, 2006 OK 58, ¶ 35, 44, 46, 152 P.3d 165, 178-80.

Independent appellate review of punitive awards has multiple functions. First, it protects the parties in specific cases by "safeguard[ing] against excessive verdicts." *Id.*, ¶ 35, 152 P.3d at 178. In other words, it

"assure[s] the uniform general treatment of similarly situated persons that is the essence of law itself." *Cooper*, 532 U.S. at 436 (internal quotation omitted). Second, *de novo* review protects the State's jurisprudence, generating lasting benefits by "unify[ing] precedent" and "stabiliz[ing] the law." *Id.* (internal quotation omitted). Appellate review inevitably affects future awards, which will be reviewed in light of "the sanctions imposed in other cases for comparable misconduct." *Id.* at 435.

Affirming the huge punitive verdict in this case would distort Oklahoma law and create an upward spiral, allowing future plaintiffs with only slightly more dramatic fact patterns to justify even higher punitive damages. This Court should therefore disregard Plaintiffs' invocation of an outdated, deferential standard of review and scrutinize the award independently.

C. The punitive award cannot survive scrutiny under the Due Process Clause.

In addition to mandating *de novo* review, the U.S. Supreme Court has adopted three "guideposts" for substantively analyzing punitive damage awards. *Campbell*, 538 U.S. at 418 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 575). These standards emanate from the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *See Cooper*, 532 U.S. at 433. Plaintiffs fail to show that the award below is consistent with *any* of the three guideposts.

1. The alleged conduct is not so "reprehensible" as to warrant further sanctions.

The "most important" guidepost concerns the reprehensibility of the conduct at issue. *Campbell*, 538 U.S. at 419. "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so puni-

tive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* (citing *Gore*, 517 U.S. at 575). A *de novo* review of the reprehensibility guidepost demonstrates that this case is unremarkable. Defendants failed to make payments to Plaintiffs totaling about $750,000 over 12 years under an obscure net-profits-interest provision. Such facts do not establish reprehensibility under the factors articulated in *Campbell*, 538 U.S. at 419, which are:

- **whether "the harm caused was physical as opposed to economic"**—Plaintiffs do not dispute that this case involves *exclusively economic* injuries.
- **whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"**—The wrongful conduct here was simply a contractual breach, but even if squeezed into the form of a tort, there is no evidence that it put Plaintiffs' "health or safety" at risk.
- **whether "the target of the conduct had financial vulnerability"**—Punitive damage cases often involve especially vulnerable targets. *See, e.g.*, *Campbell*, 538 U.S. at 413 (elderly couple facing total financial ruin); *Gilbert*, ¶¶ 6, 8, 152 P.3d at 172 (a "noticeably retarded" man living on social security disability and "staying at least part of the time in a homeless shelter"). By contrast, Plaintiffs here do not deny that they are "well-represented owners of valuable oil-and-gas interests with diverse additional income sources." (Appellants' Br. 28)

- **whether "the conduct involved repeated actions or was an isolated incident"**—Defendants' one-time failure to properly include the Brittain Deese and Brittain Deep No. 2 in their monthly calculations was the root of the failure to pay amounts due. (Tr. 579-83, 598-99, 956-57) This case does not involve a series of repeated, conscious, independent decisions to breach a contract.
- **whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident"** —Defendants properly paid Plaintiffs their share of net profits from the Brittain Sims Unit. (Tr. 977-78) Undisputedly, Defendants also paid all working, royalty, and overriding royalty interest owners in each of the units. This all suggests that Defendants' failure to pay Plaintiffs incremental amounts related to two of three units was a mere blunder, not part of a scheme.

These factors uniformly reveal that the conduct at issue in this case lacks reprehensibility. Ignoring *Campbell*, however, Plaintiffs patch together short phrases from four other Supreme Court cases as support for the astonishing assertion that "Shell's conduct represented *all* categories of reprehensibility identified by the Supreme Court: 'infliction of economic injury' 'done intentionally through affirmative acts of misconduct'; 'concealment of evidence' making the 'wrongdoing hard to detect' to 'augment profit represent [*sic*] an enhanced degree of punishable culpability' and thus 'warranting substantial punitive damages.'" (Plfs.' Br. 21, emphasis added; citations omitted) Far from covering "all" reprehensibility factors, this list is at odds with the Court's actual tests outlined above. Indeed, the Supreme Court uses "inflic-

tion of economic injury," to characterize harm as *less reprehensible*. *See Campbell*, 538 U.S. at 419.

Plaintiffs' hyperbole continues when they accuse Defendants of having "kept Plaintiffs' oil and gas proceeds and then enlisted Maynard to do the same in order to maintain the cover up." (Plfs.' Br. 20-21) In fact, the cited transcript pages and exhibits do not show any evidence of "enlist[ing] Maynard" to do anything. Rather, they show that Maynard asked SWEPI about Plaintiffs' interest after receiving a letter from Mr. Fuller (PX 131); SWEPI then assigned a young division order analyst to research the issue; the analyst wrote back to Maynard to say that her superiors in the Joint Venture Accounting department would be responding with more information (PX 134); and that department later provided some accounting records to Maynard showing SWEPI's latest calculation of payments due Plaintiffs (PX 136). Nowhere in the cited documents or testimony is there any indication that Shell or SWEPI invited Maynard to participate in any ongoing fraudulent scheme. Hyperbole is no substitute for a showing of how Defendants' conduct fits the Supreme Court's defined parameters for assessing reprehensibility.

Plaintiffs repeatedly cite *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). It does not help them. *TXO* did affirm a large award with a high ratio ($19,000 in actual and $10 million in punitive damages), but it predates *Gore*, *Cooper*, and *Campbell*. More importantly, *TXO* punished genuinely reprehensible behavior which, when contrasted with this case, shows how unremarkable the facts here are. *TXO* involved a pre-planned scheme to escape from a large royalty obligation the company had undertaken in accepting an oil-and-gas assignment. *Id.* at 447. The scheme involved

manufacturing a baseless objection to the assignee's title by obtaining a quitclaim deed from another interest owner in the chain of title, conniving to have that owner execute a false affidavit, and then knowingly filing a frivolous lawsuit to have this quitclaim deed declared good title. *Id.* at 448-49. Through its deception of others and abuse of the judicial system, TXO hoped to enrich itself by millions of dollars. *Id.* at 462. Worse yet, TXO had committed similar acts before. *Id.* at 450–51, 462, 469.

By contrast, the failure to pay in this case was an administrative mistake, not the core of Defendants' business strategy. The assertions made against Defendants —including "enlisting" Maynard in a conspiracy—are belied by the record. And, far from the millions at issue in *TXO*, the amount of money at issue here was $750,000 over 12 years. Thus, *TXO* is inapposite both because it is a pre-*Gore*, pre-*Campbell* analysis and because it is factually nothing like this case.

2. The punitive-to-compensatory ratio exceeds constitutional limits.

The second guidepost for reviewing punitive awards is the ratio of punitive to compensatory damages. *See Campbell*, 538 U.S. at 424. Plaintiffs argue that the ratio in this case is 4:1, and they accuse Defendants of trying "to manipulate the ratio . . . by excluding the interest element of damages." (Plfs.' Br. 21) Because PRSA prejudgment interest is itself a *penalty*, however, it cannot be considered part of *compensatory* damages. (*See* Appellants' Br. 25) Plaintiffs wrongly assert that PRSA prejudgment interest is compensatory for ratio purposes because it "is treated as an element of the legal damage for the operator's default." (Plfs.' Br. 19) But the fact that interest is "an element" of recoverable damage proves nothing; punitive damages are *themselves* an ele-

ment of legal damage. *See Rodebush v. Okla. Nursing Homes, Ltd.*, 1993 OK 160, ¶ 21, 867 P.2d 1241, 1247; *Thiry v. Armstrong World Indus.*, 1983 OK 28, ¶ 11, 661 P.2d 515, 517. The issue is not whether interest is recoverable, but rather what the *nature* of interest as an element of damage is. This Court has clearly held that PRSA interest in effect until July 1, 1995 was a *penalty*. *Fleet v. Sanguine, Ltd.*, 1993 OK 76, ¶ 11, 854 P.2d 892, 899–900 ("[I]t is not merely compensation for the use of money belonging to another. Rather, it is interest *qua* penalty to compel compliance with [PRSA]."). As a *penalty*, rather than an element of *compensatory* damages, PRSA interest cannot properly be considered when assessing the punitive-to-compensatory ratio under constitutional standards. When PRSA interest is excluded from compensatory damages here, the resulting ratio is 71:1, which clearly exceeds the constitutional guideposts established by the U.S. Supreme Court.[17]

Moreover, even if the PRSA interest were properly considered a form of compensatory damages, the punitive award here still exceeds what is allowable under the ratio guidepost. If PRSA interest is treated as compensation, as Plaintiffs mistakenly urge, the resulting ratio is 4:1. Selectively quoting from *Campbell*, Plaintiffs misleadingly suggest that the Supreme Court has endorsed the

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[17] Plaintiffs argue that PRSA's 12% interest rate is reasonable (and therefore compensatory) because "in most years prior to the filing of this action the Oklahoma judgment interest rate was more than 12%." (Plfs.' Br. 19). But there is no single "Oklahoma judgment interest rate." The statutes cited by Plaintiffs apply only to damages for personal injuries or injury to personal rights. Okla. Stat. tit. 12 § 727(E), § 727.1(E). By contrast, the rate most relevant here is the 6% found in Okla. Stat. tit. 15, § 266. *See Heiman v. Atl. Richfield Co.*, 1995 OK 19, ¶ 16, 891 P.2d 1252, 1258 (awarding 6% interest on working interest owner's recovery from well operator).

concept of "double, treble, or quadruple damages" for punitive awards. (Plfs.' Br. 22) But Plaintiffs fail to note that *on the same page* as the language they quote, *Campbell* states that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. A lawful pre-judgment interest rate applied to the $750,000 underpayment results in a compensatory award of approximately $2,000,000, an indisputably substantial amount. *See, e.g., Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 488-89 (6th Cir. 2007) (compensatory awards around $400,000 have been repeatedly characterized as "substantial" for purposes of *Campbell*'s 1:1 maximum ratio). Thus, contrary to Plaintiffs' suggestion that a 4:1 ratio would pass constitutional muster here, a complete reading of *Campbell* shows that a 1:1 ratio is at the "outermost limit" of an allowable punitive award in this case.

In a final effort to justify a higher ratio, Plaintiffs repeatedly assert that the conduct at issue here was "hard to detect," noting that the Supreme Court allows enhanced punitive damages in such cases. (Plfs.' Br. 20, 21) Although wrongdoing that is hard to detect may warrant higher punitive damage ratios in cases where the difficulty of detection is a central element in a tortfeasor's scheme, Plaintiffs here were not victims of such a scheme and they had multiple tools available through which they could have detected Defendants' error much sooner. First, Mr. Fuller received and carefully reviewed monthly statements concerning the properties at issue. *See supra*, Section II(E). Second, Plaintiffs received actual notice of the Corporation Commission proceedings in which the Brittain Deese Unit was created and the

1972 drilling and spacing order was entered. (Tr. 1049, 1078-79; DX 195; DX 218) Moreover, the fact that the Brittain Deep No. 2 well was drilled under the 1972 order was a matter of public record. (Tr. 403-404) Thus, Plaintiffs could have discovered Defendants' inadvertent failure to pay them a share of net profits related to the Brittain Deep No. 2 and the Brittain Deese Unit. Additionally, by their own admission, no Plaintiff had even read the 1927 Agreement until 1995. (R. 2620 at ¶ 51; R. 2663) That Agreement empowered Plaintiffs to review and audit all production, payment, and well information. (PX 3) None of the Plaintiffs exercised their right to do so. Moreover, all Plaintiffs received and three Plaintiffs actually signed division orders from Maynard in May 1986 acknowledging their interest in the Brittain Deep No. 2 and the Brittain Deese Unit. (DX 293-DX 298; PX 126; Tr. 751-758) Finally, throughout the relevant period, Plaintiffs were represented by sophisticated agents, including multiple law firms, bankers, accountants, and the co-author of an oil and gas law treatise who was trustee of the Dings Trusts. (*See* PX 61, 64; Tr. 636-40) Any of these representatives, or the Plaintiffs themselves, could have used their contractual audit rights, the Corporation Commission notices actually received, or publicly available information to detect Defendants' error. Although the availability of such sources of information does not excuse Defendants' error in the first instance, it certainly dispels any suggestion that Defendants should be subject to a heightened punitive ratio based on the purported difficulty of detection.

3. Comparable penalties demonstrate how excessive the punitive award is.

The final constitutional guidepost is "the disparity between the punitive damage award and the 'civil penal-

ties authorized or imposed in comparable cases.'" *Campbell*, 538 U.S. at 428. As discussed above and in Defendants' opening brief, the fact that Oklahoma law already establishes a "penalty" for Defendants' alleged conduct in the form of PRSA interest demonstrates that an additional layer of punishment in the form of a huge punitive award is improper. *See Fleet*, ¶ 11, 854 P.2d at 899. (Appellants' Br. 25, 30) Plaintiffs cite *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308 (10th Cir. 1998), as suggesting that PRSA interest does not preclude an award of punitive damages. (Plfs.' Br. 18) But *Okland* actually agrees with *Fleet* that the enhanced interest rate "acts to compel compliance" and therefore is not aimed at making plaintiffs whole. *Id.* at 1320. Even if there were a conflict between *Okland* and *Fleet*, a federal court opinion cannot displace the authoritative construction of Oklahoma law by this Court.

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APPENDIX M
IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA DIVISION NO. III

CASE NO. 106470

NANCY FULLER HEBBLE, SUSAN FULLER MALEY, AS INDIVIDUALS; NANCY HEBBLE AND SUSAN MALEY, AS CO-TRUSTEES OF THOMAS R. FULLER TESTAMENTARY TRUST; WACHOVIA BANK, N.A., AS EXECUTOR OF ESTATE AND TRUSTEE OF ELIZABETH FULLER GARDNER TRUST; MARSHALL T. STEVES, TRUSTEE OF THE DINGS TRUST AGENCY,

Plaintiffs/Appellees,

vs.

SHELL WESTERN E & P, INC. AND SHELL OIL COMPANY,

Defendants/Appellants.

(JANUARY 7, 2010)

APPELLANTS' PETITION FOR REHEARING AND BRIEF IN SUPPORT

Appeal from the District Court of Stephens County, Oklahoma, No. CJ-95-234L
Honorable Michael C. Flanagan,
Associate District Judge, Presiding
Action at Law for Actual and Punitive Damages

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* * *

Appellants Shell Western E & P, Inc. and Shell Oil Company (referred to herein collectively as "Shell"), pursuant to Okla. Sup. Ct. R. 1.77(a), move this Honorable Court for rehearing of its December 18, 2009 Opinion in this case for the following reasons.

I. This Court should grant rehearing to vacate or reduce the punitive damages award.

The staggering $53 million punitive damages award affirmed by this Court violates the U.S. Constitution. In a series of opinions starting in 1996, the U.S. Supreme Court has required that reviewing courts independently scrutinize awards of punitive damages under an exacting, *de novo* standard of review. The Court also has provided binding, comprehensive guidance on how to assess the constitutionality of such awards. This Court's opinion fails to meet those standards, and the Court's analysis would be insufficient to sustain any punitive damages award—much less one of the highest-ever awards in this jurisdiction.[1]

The U.S. Supreme Court has repeatedly stated that the federal Constitution requires appellate courts to "apply a *de novo* standard of review" to punitive damages awards. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). Far from being haphazard or deferential, the review must be "a thorough, independent review." *Id.* at 441. It must be "[e]xacting," entailing an

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[1] In addition to being unsustainable under the federal Constitution, the punitive damages award should be reversed or remitted on the state-law ground that it was manifestly the result of improper passion or prejudice on the part of the jury. *See, e.g., Chandler v. Denton*, 1987 OK 38, 741 P.2d 855 (directing remittitur of punitive damages where the jury also awarded "ample and generous" actual damages).

evaluation of the award in light of the governing law. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). The Supreme Court has set the example for how to review punitive awards by, in its own jurisprudence, carefully and fully summarizing the evidence and weighing all sides of a case before reaching a conclusion. *See* Br. at 27; Reply Br. at 23-24.

By comparison, this Court appears to have conducted a cursory and impressionistic review, with but a glancing nod to the facts. This Court's consideration of the punitive damages award in paragraph 26 proceeds in three steps: (1) stating that Shell's reprehensibility was "heightened" because of a fiduciary relationship—a rule announced for the first time *in this opinion*; (2) reasoning that the ratio is 4:1, not 71:1; and (3) declaring that "[w]e do not find this disparity unreasonable." This bare conclusion, however, is not anchored on any of the factors identified by the Supreme Court. And the only case cited to support the finding of reasonableness is *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), which pre-dates the earliest of the ratio-test cases (*BMW v. Gore*, 517 U.S. 559 (1996)) by three years and is entirely distinguishable on its facts.

A. The reprehensibility analysis ignores the Supreme Court's standards.

The Supreme Court has listed five factors through which courts must analyze the "most important" lens for punitive damages awards—reprehensibility. *Campbell*, 538 U.S. at 419; *see also* Br. at 27-28; Reply Br. at 24-26. Reprehensibility turns on (1) whether the harm was "physical as opposed to economic," (2) whether there was "indifference to or a reckless disregard of the health or safety of others," (3) whether "the target of the conduct had financial vulnerability," (4) whether "the con-

duct involved repeated actions" rather than "an isolated incident," and (5) whether the harm "was the result of intentional malice, trickery, or deceit, or mere accident." *Campbell*, 538 U.S. at 419. In this case, the first four reprehensibility factors unequivocally militate against *any* punitive damages at all. Reply Br. at 25. Yet this Court simply ignores each of those four factors, apparently pretending they do not exist. Instead, the Court implies that Shell's conduct was sufficiently reprehensible to justify a record-setting punitive award because Shell engaged in "deceit." Op. ¶ 26.

There are two problems with this analysis. First, even assuming that Shell's conduct was deceitful, that factor alone is almost certainly an insufficient basis to sustain the award here: "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Campbell*, 538 U.S. at 419. Second, this Court's conclusion that "the reprehensibility of Shell's conduct is heightened by its intentional deceit of [plaintiffs] whose oil proceeds it held for their benefit while it owed [them] a fiduciary duty" is unsupported by the record. Op. ¶ 26. There is no evidence that Shell's initial mistake in failing to include the Brittain Deese or Brittain Deep No. 2 in its net profits interest calculations was intentional or fraudulent. To the contrary, the record clearly reflects that Shell actually paid Plaintiffs with respect to the Brittain Sims Unit. (Tr. 977-978; PX 250, Sch. D) This undisputed evidence (which the Court's opinion ignores) confirms that Shell's failure to pay was an unintended mistake, and not part of a reprehensible scheme to defraud Plaintiffs.

Moreover, the rule that a fiduciary duty exists in these circumstances was announced for the first time *in this Court's opinion. See* Section III, *infra.* Shell cannot be punished—especially with such severity—for violating a fiduciary duty which, at the time of the conduct in question, it had no reason to believe existed.

B. <u>The ratio is not 4:1.</u>

The opinion states that the "punitive damage award was slightly more than four times the amount of the actual damages awarded." Op. ¶ 26. This follows from a faulty and atemporal analysis of the nature of prejudgment interest under the PRSA. *See* Op. ¶ 22. The Court's only basis for concluding that the PRSA interest was not a penalty was the deletion of the phrase "as a penalty" in a 1985 amendment to § 540, effective October 17, 1985. Of course, this means that for all but the final two and a half months of the damages period here (which ended December 1985), the statute in question *expressly defined* prejudgment interest "as a penalty," as recognized by the Oklahoma Supreme Court. *Fleet v. Sanguine, Ltd.*, 1993 OK 76, ¶ 11, 854 P.2d 892, 899 (holding that, for periods before the effective date of the 1985 amendment, interest under § 540 "is interest *qua* penalty"). The Legislature's later modification of the statutory language did nothing to change the penal character of prejudgment interest awarded on production prior to October 17, 1985, which is almost all of the production here.

Moreover, wordsmithing by the Legislature cannot alter the fundamental penal nature of prejudgment interest under § 540. For instance, when one state tried to evade Sixth Amendment requirements by renaming sentencing elements as something else, the Supreme Court made short work of rejecting that trick, holding

that each fact used to increase a criminal defendant's punishment "no matter how the state labels it—must be found by a jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 602 (2002). Similarly, what the Legislature *calls* the prejudgment interest awarded under § 540 is not dispositive of whether such interest is, indeed, a penalty.

The 12% prejudgment interest provided in § 540 functions as a penalty because it is an enhanced amount going beyond what is necessary for the time-value of money, as Oklahoma law itself shows. *See* Reply Br. at 28 & n.17. The penal nature of § 540 interest is further revealed in this Court's recognition that the PRSA "imposes standards for the treatment of proceeds from the sale of oil and gas production." Op. ¶ 18 (citation omitted). This passage implicitly recognizes that the PRSA sets standards of performance and imposes financial consequences for failure to meet those standards—which is the essence of a penalty, whatever label the Legislature has tried to apply.

Finally, in this Circuit, even ordinary prejudgment interest that merely accounts for the time-value of money is not considered as part of compensatory damages for purposes of punitive damage calculations.[2] But the interest here is not ordinary prejudgment interest; rather, the PRSA interest functions as a penalty, and the U.S.

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[2] In *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207 (10th Cir. 2000), for example, the Tenth Circuit considered an award with $67,000,000 in compensatory damages, $58,500,000 in punitive damages, and $28,208,440 in pre-judgment interest. *Id.* at 1214. In calculating the ratio, the court specifically considered only the compensatory award and not the interest, noting that punitive damages "w[ere] only 87% of" compensatory damages. *Id.* at 1232-33. Had the prejudgment interest been included, that number would have further shrunk to 61%.

Supreme Court has specifically warned against double counting of this sort, when "compensatory damages . . . [are] based on a component which was duplicated in the punitive award." *Campbell*, 538 U.S. at 426. Consequently, the ratio here is *not* "slightly more than four," Op. ¶ 26, and this Court should grant rehearing to consider the $53 million punitive award in comparison to the compensatory damages of $750,708.

C. Even if the ratio were 4:1, the assessment of "reasonableness" omitted crucial constitutional requirements.

This Court, after concluding that the ratio was only 4:1, declared that "[w]e do not find this disparity unreasonable." Op. ¶ 26. But, with respect, the subjective reaction of this Court is not relevant to the analysis; rather, the standard is whether a punitive award affirmatively is reasonable in light of the constitutional standards articulated by the U.S. Supreme Court. Because nothing in the Court's opinion gives any hint as to why *this exact amount* of punitive damages is justifiable, the inescapable conclusion is that the Court has effectively deferred to the jury—which is exactly what the Supreme Court has said appellate courts must not do. *See Cooper*, 532 U.S. at 436.

The only justification this Court did offer for the punitive ratio here is manifestly invalid. The opinion suggests that "[t]he punitive damage award in this case compares favorably with that in *TXO* . . . where the jury awarded $19,000.00 in actual damages arising from the defendant's baseless claim on plaintiff's oil and gas interests and $10,000,000.00 in punitive damages. Proportionally, Shell has received a much lighter sanction." Op. ¶ 26. This reasoning is wrong for several reasons. First, as Shell described in detail, the facts of *TXO* show

a level of reprehensibility that rarely is met. The *TXO* defendants attempted an especially despicable act, trying to co-opt the judicial system into accomplishing a substantial fraud. They even tried to extort false affidavits about property ownership in an effort to trick judges into transferring that property to the defendants. *See* Reply Br. at 26-27 (describing *TXO* in detail). By contrast, Shell's failure to pay Plaintiffs was the result of a mistake. Thus, Shell is not "similarly situated" to the *TXO* defendants, as would be necessary for an analysis in which the ratio in *TXO* was to be used as a touchstone. *Gore*, 517 U.S. at 587.

Second, *TXO* involved an almost token level of compensatory damages—$19,000. In *TXO*, the attempted fraud (which would have amounted to many millions of dollars if successful) was discovered *before* it could be completed. Because the compensatory damages were low, the only way for the judicial system to reflect the requisite outrage was through a larger ratio of punitive damages. By contrast, the actual damages here were substantial, and they were already enhanced by a huge PRSA interest award. In such circumstances, the Supreme Court has suggested that plaintiffs can expect not a 4:1 ratio (much less 71:1), but something much lower, such as a 1:1 ratio: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425.

Third, *TXO* was not a "multiplier" or "ratio" case. *TXO* was decided in 1993, three years before the Court began systematizing its current constitutional doctrine. Like many other pre-1996 cases, *TXO* may well have required a different punitive award had it been subjected to the kind of scrutiny that the Court now recognizes as

mandatory. It is also possible that, for the reasons described above, it would be one of the "rare cases" in which a "single-digit ratio" could be exceeded—and if so, it would *still* be an inappropriate case for purposes of comparison.

For all these reasons, this Court's analysis simply does not explain why the punitive damages award is appropriate at all, much less appropriate in such a huge amount. There is no explanation for why this Court believes that the failure to pay these net profit interests—while wrong—is among the *most* malicious, ignominious, and blameworthy acts in the history of Oklahoma jurisprudence.

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APPENDIX N
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CASE NO. 106470

NANCY FULLER HEBBLE, SUSAN FULLER MALEY, AS INDIVIDUALS; NANCY HEBBLE AND SUSAN MALEY, AS CO-TRUSTEES OF THOMAS R. FULLER TESTAMENTARY TRUST; WACHOVIA BANK, N.A. AS EXECUTOR OF ESTATE AND TRUSTEE OF ELIZABETH FULLER GARDNER TRUST; MARSHALL T. STEVES, TRUSTEE OF THE DINGS TRUST AGENCY,

Respondents/Appellees,

VS.

SHELL WESTERN E & P, INC., AND SHELL OIL COMPANY,

Applicants/Appellants.

(FEBRUARY 16, 2010)

PETITION FOR WRIT OF CERTIORARI

Appeal from the District Court of Stephens County, OK,
No. CJ-95-234L
Honorable Michael C. Flanagan,
Associate District Judge, Presiding
Action at Law for Actual and Punitive Damages

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* * *

This Petition seeks review of a Court of Civil Appeals ("COCA") opinion that affirmed the largest punitive damages award in state history. The December 18, 2009 opinion (rehearing was denied on January 26, 2010) affirms a ***$53 million punitive damages award*** based on Shell Oil Company and Shell Western E&P Inc.'s (collectively "Shell") failure to pay Plaintiffs a total of $750,708 in net profits that, pursuant to contract, accrued monthly between 1973 and 1985. COCA's errors include:

- Sanctioning an unconstitutional punitive damages award without undertaking the rigorous de novo review mandated by the U.S. Supreme Court to satisfy due process.
- Imposing an entirely new fiduciary duty on an operator under a § 87.1 drilling and spacing unit, and compounding the error by applying this newly created duty retroactively.
- Ignoring fundamental error—the wrong burden of proof instruction in the jury charge—in affirming the judgment for fraud.
- Allowing retroactive application of a penal statute, and thereby affirming over $12 million in prejudgment interest as to previously accrued claims, although the statutory claim was not submitted to the jury and was barred by limitations.
- Converting a breach of contract into a tort claim, which defeated the parties' expectations, the applicable limitations period, and the constitutional prohibition against punitive awards for breach of contract.
- Imposing a collective judgment for all Plaintiffs against all Defendants based on a flawed verdict

form that did not permit individualized liability and damages findings.

- Deferring to the trial court's decision to lift the 1-to-1 punitive damages cap, even though the record did not support doing so.

These profound errors disregard binding precedent and due process, raising significant issues of vital importance to the integrity of the judicial process. Certiorari should be granted because COCA has decided several questions of substance "in a way probably not in accord with applicable decisions of this Court or the [U.S.] Supreme Court," and because COCA "so far departed from" the requirements of law "as to call for the exercise of this Court's power of supervision." Okla. S. Ct. Rule 1.178(a)(2), (4).

* * *

II. COCA's punitive damages decision conflicts with decisions of the U.S. Supreme Court and this Court.

A. COCA ignored its responsibility to conduct a *de novo* assessment.

COCA shirked its constitutional duty to conduct an exacting, *de novo* review of the punitive damages award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001). A punitive award is a "quasi-criminal" tool. *Cooper*, 532 U.S. at 432. To protect against arbitrariness and ensure the integrity of the judicial system, the U.S. Constitution requires heightened appellate scrutiny of a punitive award, including "a thorough, independent review" of its factual basis. *Id.* at 441. As this Court has noted, the review is subject to a specific analytical framework. *See Gilbert v.*

Sec. Fin. Corp. of Okla., Inc., 2006 OK 58, ¶¶ 28-47, 152 P.3d 165, 176-80.

COCA's barebones opinion dedicated only two sentences to the constitutional requirements for punitive awards. Op. ¶ 25. Omitting any discussion of Shell's evidence, COCA's application of the constitutional requirements was superficial at best. Op. ¶ 26. That analytical abdication does not satisfy due process. *See, e.g., Campbell*, 538 U.S. at 418 (exacting appellate review is itself part of a defendant's due process right).

B. COCA ignored the binding guideposts for analyzing reprehensibility.

The most important "guidepost" for assessing the constitutionality of a punitive award is the reprehensibility of the conduct. *Id.* at 419. This punitive award exceeds any other in Oklahoma history. A cursory review of the record demonstrates that Shell's conduct is not remotely close to the all-time most egregious violation of a legal duty in this state.

The U.S. Supreme Court has articulated five factors for assessing reprehensibility. Finding only one is not enough. *Id.* But COCA entirely ignored four of the factors. Its reprehensibility analysis consists of a single, conclusory sentence:

> In the present case, the reprehensibility of Shell's conduct is heightened by its intentional deceit of the interest owners whose oil proceeds it held for their benefit while it owed a fiduciary duty to those owners . . . .

Op. ¶ 26. But arrayed against the U.S. Supreme Court's factors, Shell's reprehensibility is low:

(1) whether the harm was "physical as opposed to economic"	The harm was purely economic.
(2) whether there was "indifference to or a reckless disregard of the health or safety of others"	There were no health or safety consequences.
(3) whether "the target of the conduct had financial vulnerability"	Plaintiffs were sophisticated owners of valuable mineral estates who were represented by lawyers and bankers at the time in question.
(4) whether "the conduct involved repeated actions" rather than "an isolated incident"	The failure to pay is traceable to a single failure to include the relevant units in Shell's system for accounting to interest owners.
(5) whether the harm "was the result of intentional malice, trickery, or deceit, or mere accident"	That Shell paid Plaintiffs on the Brittain Sims Unit, and paid all royalty owners, confirms that the failure to pay Plaintiffs was a mistake.

See Campbell, 538 U.S. at 419. While completely ignoring the first four factors, COCA mentions "deceit" only fleetingly without analyzing the supposed deception. Abdicating its constitutionally mandated role on review, COCA ignored that Shell's failure to pay, albeit a contractual breach, did not arise from an intentional scheme or malice. The evidence supports nothing more nefarious than an initial mistake followed by reliance on limitations as a basis for non-payment once the error was discovered. Punishing a defendant for invoking a legal

defense—like limitations—defies sound jurisprudence absent evidence it was raised in bad faith.

C. <u>The punitive-to-compensatory ratio is unconstitutionally excessive.</u>

COCA dramatically understated the ratio of punitive to compensatory damages, which is the second mandatory "guidepost" for assessing punitive awards. By adding the $12.4 million in interest under the PRSA to the $750,708 compensatory damages, COCA tried to make a 71:1 ratio appear to be a more modest 4:1. *See* Op. ¶ 26. For purposes of a punitive damages ratio, however, prejudgment interest should not be treated as compensatory. *See, e.g., United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1214, 1232-1233 (10th Cir. 2000). Even if *ordinary* interest might be permissibly included in ratio calculations, prejudgment interest under the PRSA clearly cannot be. This Court has specifically described the *12% compound interest* under PRSA as "interest qua penalty." *Fleet v. Sanguine, Ltd.*, 1993 OK 76, ¶ 11, 854 P.2d 892, 899. Indeed, for all but the last two months of underpayments, § 540 expressly stated that 12% interest operates "as the penalty" under the statute. *See* 1985 Okla. Session Laws ch. 141, at 891. Because PRSA interest is penal in nature, it cannot be considered compensatory when evaluating the compensatory-to-punitive ratio. *See Campbell*, 538 U.S. at 426. Contrary to COCA's reasoning, Op. ¶ 22, the Legislature's later deletion of the phrase "as the penalty" does not alter the constitutional calculus to determine whether a particular award is a penalty.

Worse, this award is unconstitutional *even at a 4:1 ratio*. Compensatory damages and lawful prejudgment interest are already substantial. "When compensatory damages are substantial, then a lesser ratio, ***perhaps***

only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425 (emphasis added). There can be no dispute that $750,708—much less $13.2 million—is "substantial." *See, e.g., Bridgeport Music, Inc. v. Justin Combs Pub'g*, 507 F.3d 470, 490 (6th Cir. 2007) (courts hold $400,000 to be "substantial"). Thus, a punitive award exceeding a 1:1 ratio is unconstitutional.[1]

The punitive damages award also fails as a matter of Oklahoma law because it is grossly excessive or the result of improper passion, prejudice, or sympathy on the part of the jury. *See, e.g., Buzzard v. Farmers Ins. Co.*, 1991 OK 127, 824 P.2d 1105, 1116 (ordering remittitur).

* * *

[1] As Shell argued below, the third *Campbell* guidepost—the disparity between the punitive damages award and the civil penalties authorized in comparable cases—also supports reversal.

APPENDIX O
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CASE NO. 106470

NANCY FULLER HEBBLE, SUSAN FULLER MALEY, AS INDIVIDUALS; NANCY HEBBLE AND SUSAN MALEY, AS CO-TRUSTEES OF THOMAS R. FULLER TESTAMENTARY TRUST; WACHOVIA BANK, N.A. AS EXECUTOR OF ESTATE AND TRUSTEE OF ELIZABETH FULLER GARDNER TRUST; MARSHALL T. STEVES, TRUSTEE OF THE DINGS TRUST AGENCY,

Respondents/Appellees,

VS.

SHELL WESTERN E & P, INC. AND SHELL OIL COMPANY,

Applicants/Appellants.

(MARCH 15, 2010)

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Appeal from the District Court of Stephens County, OK,
No. CJ-95-234L
Honorable Michael C. Flanagan,
Associate District Judge, Presiding
Action at Law for Actual and Punitive Damages

* * *

Plaintiffs fill their Answer with factual misstatements, references to disputed matters outside the record, and erroneous assertions of law.[1] Their approach goes beyond good-faith argument and is wholly improper. Plaintiffs' rhetoric, however, cannot obscure the analytical shortcomings and manifest errors in COCA's opinion. Those failures plainly meet the standards for granting certiorari.

I. COCA failed to adhere to constitutional standards for reviewing punitive awards.

COCA correctly concluded that it was required to review this punitive damages award under federal constitutional principles. Op. ¶ 25.[2] But COCA's execution of that duty failed to meet constitutional standards. COCA did not even mention four of the five factors for evaluating reprehensibility, which is the most important "guidepost" for reviewing punitive damages awards. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418-19 (2003). Plaintiffs now suggest that, despite COCA's silence, this massive punitive award can be

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[1] Plaintiffs' factual misstatements begin on page 1, line 1 with the assertion that they owned "a carried working interest." In fact, Plaintiffs' expert admitted they were *not* working interest owners. (Tr. 391, 399). On page 2, Plaintiffs outrageously assert that "Shell enlisted Maynard Oil in a conspiracy of silence." Plaintiffs, however, did not assert a conspiracy claim, there is no finding of conspiracy in the record, and Maynard's witness testified that Shell did not influence Maynard's independent decision not to pay Plaintiffs on the Brittain Deep #2. (Court Ex. A at 128).

[2] Citing a portion of COCA's opinion *on a completely different issue*, Plaintiffs misleadingly assert that Shell failed to preserve its argument that the evidence supporting the punitive damage award is insufficient. Answer at 3 n.4. COCA clearly understood that error was preserved. Op. ¶ 25.

allowed to stand because the record contains evidence on two of the four omitted factors, and because a third factor—whether "the harm caused was physical as opposed to purely economic," *Campbell*, 538 U.S. at 419—can just be ignored. *See* Answer at 4-5.[3] Plaintiffs' evidentiary arguments are either unsupported by citations to the record or supported with misleading references.[4] But in any event, Plaintiffs' arguments based on *the record* misses the point. What matters on certiorari is COCA's *opinion* and whether the quality of the analysis therein satisfies due process. Because COCA did not even mention four of the five reprehensibility factors, it failed to perform an "exacting" *de novo* analysis of the record, which is sufficient reason to grant certiorari. *See Campbell*, 538 U.S. at 418.

Plaintiffs seek to bolster COCA's barebones reprehensibility analysis by suggesting that Shell's failure to pay resulted from "an intentional scheme to defraud" Plaintiffs. Answer at 4. Far from revealing any intentional scheme, the record establishes that, in the 1970s, Shell erred in setting up *some* (but not all) of Plaintiffs' interests for payment in Shell's manual joint interest accounting system. In any event, it is for *the appellate court*, not Plaintiffs, to assess reprehensibility. *See id.* COCA's opinion does not cite any evidence to support its conclusion that Shell engaged in "intentional deceit," Op.

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[3] Like COCA, Plaintiffs do not even mention the final factor—whether a defendant showed a reckless disregard of the health or safety of others—which clearly weighs against the award here.

[4] For example, Plaintiffs suggest that Thomas Fuller was financially vulnerable because he "lived in a trailer house." Answer at 4. In fact, Mr. Fuller, who owned businesses and regularly hired lawyers (Tr. 722-723, DX 267), moved to a mobile home in California wine country after retiring. (Tr. 724).

¶ 26, and neither Plaintiffs nor COCA cite any authority suggesting that it is reprehensible for a defendant to rely on a good-faith limitations defense once a decades-old error comes to light. Certiorari should be granted because COCA ignored four of the five relevant reprehensibility factors and its analysis of the remaining factor is impermissibly conclusory.

On the ratio guidepost, Plaintiffs do not deny that, if PRSA interest is deemed punitive rather than compensatory, the resulting 71:1 ratio is unconstitutionally excessive. Plaintiffs assert that "PRSA interest is compensatory" and is "not penal," Answer at 5, but their two authorities suggest the opposite. Both cases hold that, for claims arising prior to 1985, "[p]rejudgment interest in the § 540(B) sense is *not* merely compensation for the use of money" but rather is "interest *qua* penalty." *Fleet v. Sanguine, Ltd.*, 1993 OK 76, ¶ 11, 854 P.2d 892, 899; *Purcell v. Santa Fe Minerals, Inc.*, 1998 OK 45, ¶ 17, 961 P.2d 188. Plaintiffs cite no authority that the 1985 amendments somehow transform accrued *penal* amounts into mere *compensation*.

* * *

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No. 10-349

IN THE

Supreme Court of the United States

SHELL OIL COMPANY; SWEPI, LP
(As Successor-in-Interest to
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Petitioners,

v.

NANCY FULLER HEBBLE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case involves an award of prejudgment interest on unlawfully withheld proceeds from the sale of oil and gas production using different statutory interest rates in effect at different times. Oklahoma courts have deemed such prejudgment interest compensatory as a matter of state law. *See, e.g., Fleet v. Sanguine, Ltd.*, 854 P.2d 892 (Okla. 1993). The statutory rates of prejudgment interest were historically reasonable.[1] The questions presented are:

1. Whether the prejudgment interest component of the jury's award of state-law compensatory damages of $13,205,916 should be deemed non-compensatory as a matter of federal constitutional law and thereby excluded from the ratio analysis under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

2. Whether this Court should abandon the multi-factor inquiry of *Gore*—applied by the lower courts in this case and across the country as settled law—by adopting a presumptive 1:1 ceiling on the constitutionally permissible ratio of punitive to compensatory damages.

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[1] *See infra* note 1.

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BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

This case involves a unique series of state statutes that set prejudgment interest rates for unlawfully withheld oil and gas proceeds at historically reasonable rates of return,[1] and a punitive-to-compensatory

[1] The court properly instructed the jury to use the interest rate in effect at each time period (*i.e.*, 6% simple prior to 1980, 12% simple from 1980 to 1989, and 12% compound after 1989). OKLA. STAT. tit. 52, § 570.10 (formerly § 540). Shell ignores that from 1986 to 2008 the Oklahoma judgment interest averaged more than 9%. OKLA. STAT. tit. 12, §§ 727-727.1.

damages ratio of approximately 4:1 that the state trial and appellate courts upheld only after applying the settled guideposts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Through its first question presented, Shell seeks to federalize state law definitions of compensatory damages by asking this Court to comprehensively and definitively distinguish the compensatory from the punitive for due-process purposes in a dizzying variety of contexts, from attorney fees, to treble damage awards, to disgorged profits, to damages for mental anguish, to—finally—the prejudgment interest at issue in this particular case. Pet. at 22-24. However, Shell never offered any general—much less workable—standard below, nor does it do so here.

Through its second question presented, Shell invites this Court at worst to reduce *Gore*'s case-sensitive multi-factor inquiry to a mechanical 1:1 ratio, or at best to engage in fact-bound error-correction of the lower courts' unremarkable application of *Gore* and its progeny. Neither question implicates a clear split in authority. The latter question runs contrary to this Court's approach in punitive damages cases. *See, e.g.*, *Gore*, 517 U.S. at 582 (noting that this Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"). The petition should be denied. *Cf. Stroud v. Blount*, No. 09-1572, 79 U.S.L.W. 3007, 3019 (Nov. 1, 2010) (denying certiorari on the question of whether an award of attorney fees constitutes compensatory damages for due-process purposes).

STATEMENT OF CASE

Respondents, Nancy Fuller Hebble, *et al.* ("Owners") were individuals residing in Texas, California, and North Carolina.[2] The Owners own one-fourth of an oil and gas lease in Oklahoma ("the Crews Lease"). Pet. App. 2a. The Petitioners ("Shell") operated three units producing oil and gas from the Crews Lease until 1985. *Id.* at 2a-4a. As the operator of the units, Shell sold the oil and gas and received the proceeds therefrom in trust to distribute to Owners. Under Oklahoma law, Shell had a fiduciary duty to correctly administer and distribute Owners' oil and gas proceeds. *Id.* at 6a-7a.[3]

From 1973 to 1985, Shell kept substantially all of Owners' oil and gas proceeds. Plaintiffs' Tr. Exh. P250. Shell sent monthly statements to Owners for twelve years that fraudulently showed that Owners had earned very little from the Crews Lease, thus concealing $14 million of oil and gas production. Tr. 56. Shell also sent various letters that concealed the misappropriation and contained affirmative statements that were false. *See, e.g.*, Plaintiffs' Tr. Exhs. P36, P45, P57, P59, and P74. Shell misappropriated Owners' share of the unreported oil and gas production that had been entrusted to it. Pet. App. 4a.

At the same time Shell was writing to Owners to conceal its fraud, Shell was communicating with a successor operator of the Crews Lease that continued

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[2] The Owners owned their interests individually or were beneficiaries of trusts that owned the interests.

[3] *See also Goodall v. Trigg Drilling Co., Inc.*, 944 P.2d 292, 295-96 (Okla. 1997) (Summers, J., concurring); *Leck v. Continental Oil Co.*, 800 P.2d 224, 228-29 (Okla. 1989); *Young v. West Edmond Hunton Lime Unit*, 275 P.2d 304, 309-10 (Okla. 1954).

Shell's pattern of misappropriating Owners' oil and gas proceeds. Plaintiffs' Tr. Exh. P70, P73, P136, and P137. The successor operator, Maynard Oil Company, continued the misappropriation of Owners' oil and gas proceeds for ten years. Pet. App. 4a. In 1993, Nick McGalliard, an independent petroleum land manager, discovered Maynard's and Shell's fraudulent conduct during a conversation with a Maynard land manager. McGalliard informed Owners about Shell's fraudulent conduct. Tr. 433, 440, 443-48.

In 1995, Owners brought suit in Stephens County, Oklahoma, against Maynard and Shell for breach of fiduciary duty and fraud. Pet. App. 4a. Owners settled with Maynard, and the case proceeded against Shell. *Id.* The case was tried to a jury in May 2008. Shell stipulated to the value of the oil and gas proceeds in its possession that belonged to Owners. Plaintiffs' Tr. Exh. P253. The court found that Shell had a fiduciary duty to faithfully report and distribute the proceeds. Pet. App. 2a. The jury found that Shell violated its fiduciary duty to Owners by taking Owners' oil and gas proceeds and concealing that fact over a twenty-year period. The jury also found that Shell's conduct constituted fraud. *Id.* at 5a.

At trial, Shell admitted most of the critical facts sufficient to establish Owners' claims for fraud and breach of fiduciary duty, stipulating, among other things, to the amount of oil and gas proceeds it had taken. Plaintiffs' Tr. Exh. P253. Shell argued instead that it should retain the proceeds of its unlawful conduct because, in its view, Owners knew or should have known of Shell's fraud years earlier. Pet. at 4a-5a. The jury unanimously rejected Shell's limitations defense and entered judgment in Owners'

favor. *Id.* at 5a. The jury awarded compensatory damages in the amount of $13,205,916. *Id.*

The compensatory award presumably was based upon Owners' expert witness's damages calculation, which used the statutory interest rates in effect at the various dates: 6% simple interest from 1973 through July 1, 1980, then 12% simple interest through July 1, 1989, and 12% compound interest after July 1, 1989. *Id.* at 12a-13a and Plaintiffs' Tr. Exh. P250. These rates compare favorably to the interest-rate environment over the thirty-five-year period. Prior to 1989, damages were calculated using simple interest, while market interest rates ranged from 8% to 19% compound.[4] In 1980, when Oklahoma enacted a 12% simple interest rate for unpaid oil and gas proceeds,[5] the prime rate was over 15%,[6] mortgage rates were over 13%,[7] and the "IRS rate" was 12%.[8] The effective compound rate of interest over the entire period of the compensatory damage calculation was 9.9%. The interest rates used to calculate the compensatory damage award did not operate as a penalty; they were fair rates that compensated for the time value of money.

In bifurcated proceedings, the trial court independently found clear and convincing evidence that Shell's conduct constituted fraud, non-disclosure, concealment, and deceit. Pet. App. 14a-15a, and 27a-30a. Accordingly, it returned the case to the jury

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[4] Federal Reserve Statistical Release (Data Download Program) http://www.federalreserve.gov/datadownload/Choose.aspx?rel=H.15.

[5] OKLA. Stat. tit. 52, § 540.

[6] *Supra*, note 5

[7] *Id.*

[8] 1995-1 C.B. 560 (Table 5).

to determine the appropriate amount of punitive damages to award, if any. *Id.* at 29a. The factors the jury was instructed to consider included: (1) degree of wrongfulness of the misconduct; (2) how long the misconduct lasted; (3) evidence of similar misconduct; (4) attempts to conceal the misconduct; (5) benefit from the misconduct; and (6) need to discourage others from similar misconduct. Jury Instruction 1, Second Stage. Shell did not ask the court to instruct the jury that its punitive damages award should take into account any allegedly punitive aspect of the interest already awarded. Nor did Shell ask the court to instruct the jury to award punitive damages in any particular ratio to compensatory damages. The jury returned a punitive damages award in the amount of $53,625,000, constituting a ratio of approximately 4:1. Pet. App. 2a.

The Oklahoma Court of Civil Appeals found that the reprehensibility of Shell's conduct was heightened because Shell was in a position of trust and authority when the fraud was perpetrated. Pet. App. 15a. The court found that the compensatory damages were reasonable compensation for the harm suffered by Owners and that the punitive damages award was not grossly excessive. *Id.* at 13a-16a. The Oklahoma Supreme Court denied Shell's petition for certiorari. *Id.* at 32a.

REASONS FOR DENYING THE PETITION

Neither question presented warrants this Court's review. The first question invites this Court to reject, as a federal constitutional matter, a settled state law determination that statutory prejudgment interest for unlawfully withheld oil and gas proceeds is a component of compensatory damages. But there is no

clear split in this particular context, as no federal court or state court of last resort has held that prejudgment interest of any sort—much less the kind here that compensates for the time-value of money at historically reasonable rates—cannot be considered compensatory under *Gore*. Nor are lower courts in conflict more broadly over how to distinguish the compensatory from the punitive for due-process purposes, regardless of whether the context is attorney fees, treble damage awards, disgorged profits, damages for mental anguish, or prejudgment interest. Pet. at 22-24. Lower courts properly have confined their due process analysis to case-specific application of the guideposts set forth in *Gore* rather than engaging in "wide-ranging" federal lawmaking that categorically displaces state lines between compensatory and punitive damages. Pet. at 16. This Court too should avoid that anchorless endeavor.

The second question calls on this Court either to reduce the case-specific, multi-factored *Gore* inquiry to a one-size-fits-all ratio of 1:1, a mathematical approach which this Court and the lower courts have consistently rejected, or to engage in fact-bound error correction of a 4:1 ratio, which both the trial and appellate courts found to be supported by clear and convincing evidence of fraud, non-disclosure, concealment, and deceit by Shell over the course of decades. This question also is not certworthy.

I. THE JURY'S AWARD OF PREJUDGMENT INTEREST TO COMPENSATE OWNERS FOR THE HARM INFLICTED BY SHELL DOES NOT PRESENT A SUBSTANTIVE DUE PROCESS ISSUE THAT WARRANTS THIS COURT'S REVIEW.

A. This Case Does Not Implicate Any Circuit Conflict.

Shell alleges "a wide-ranging conflict" across the lower courts on what kinds of awards should be considered as part of the *Gore* ratio. Pet. at 16. But the cases Shell cites demonstrate that there is no conflict on the issue of prejudgment interest, and no basis for this Court to grant certiorari in this case to resolve alleged conflicts regarding other kinds of awards.

1. *Prejudgment Interest.* Shell recognizes that an interest award representing a rational estimation of the time value of money is compensatory. *See* Pet. at 24. Shell then contradicts itself by asserting that "ordinary prejudgment interest" should not be treated as compensatory under *Gore*, citing decisions from three federal circuits, one state court of last resort, and one intermediate appellate state court. Pet. at 23. Unsurprisingly, the cases Shell cites do not state that prejudgment interest is not compensatory. Instead, each simply ignores prejudgment interest in analyzing the *Gore* ratio. *See, e.g.*, *JCB, Inc. v. Union Planters Bank, N.A.*, 539 F.3d 862, 876 (8th Cir. 2008); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 488-89 (6th Cir. 2007); *United Int'l Holdings, Inc. v. Wharf (Holdings), Ltd.*, 210 F.3d 1207, 1232-34 (10th Cir. 2000); *Burns v. Prudential Sec., Inc.*, 857 N.E.2d 621, 649-54 (Ohio Ct. App. 2006); *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 803 & n.10, 823-26 (W. Va. 2009).

Shell thus has not identified any decision from any circuit or state supreme court[9] addressing the question it presents here, much less any decision resolving that question in conflict with the decision in this case.

2. *Other Types of Awards.* The other cases invoked by Shell all involve legal questions that are not present in this case. Shell cites cases involving: (1) attorney fees;[10] (2) disgorged profits;[11] (3) statutory treble damages awards;[12] and (4) damages for mental anguish.[13] This Court recently denied certiorari to resolve the alleged conflict regarding attorney fees. *Stroud v. Blount*, No. 09-1572, 79 U.S.L.W. 3007,

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[9] Shell cites one case from a state intermediate appellate court in which the court held that prejudgment interest is not compensatory damages includable in the ratio. *Amerigraphics, Inc. v. Mercury Cas. Co.*, 107 Cal. Rptr. 3d 307, 329 (Cal. Ct. App. 2010). Significantly, the authority cited in *Amerigraphics*, *Bardis v. Oates*, 14 Cal. Rptr. 3d 89 (Cal. Ct. App. 2004), holds that prejudgment interest *should be included* on the compensatory side of the *Gore/State Farm* ratio. *See id.* at 100-01. In any event, unless and until the California Supreme Court adopts the rule of *Amerigraphics* as its own, the error or conflict within a state judicial system does not warrant this Court's intervention.

[10] *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 233-37 (3d Cir. 2005); *Jurinko v. Medical Protective Co.*, 305 Fed. Appx. 13, 27 n.16 (3d Cir. 2008); *Amerigraphics*, 107 Cal. Rptr. 3d at 329; *Blount v. Stroud*, 915 N.E.2d 925 (Ill. App. Ct. 2009), *cert. denied*, 79 U.S.L.W. 3007, 3019 (Nov. 1, 2010).

[11] *See Bridgeport Music*, 507 F.3d at 489.

[12] *See Modern Mgmt. Co. v. Wilson*, 997 A.2d 37, 57 (D.C. 2010); *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 621-23 (7th Cir. 2000), *cert. denied*, 531 U.S. 1153 (2001).

[13] *Boyd v. Goffoli*, 608 S.E.2d 169, 182-84 (W. Va. 2004); *Roby v. McKesson Corp.*, 219 P.3d 749, 797-98 (Cal. 2009); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 308-10 (Tex. 2006).

3019 (Nov. 1, 2010). These cases do not set forth any general approach to distinguish between compensatory and punitive damages that would put them at odds with each other, this Court, or this case. Nor would deciding this case shed any significant light on the proper treatment of attorney fees, treble damages, disgorgement, or damages for mental anguish. Indeed, as discussed below, Shell's proposed constitutional rule—allowing courts to consider, as part of compensatory damages, awards that represent "a historically accepted and currently reasonable estimate of the 'concrete loss that the plaintiff suffered by reason of the defendant's wrongful conduct,'" Pet. at 24 (citation omitted)—does not provide any additional guidance in this case, much less dictate the proper treatment of, for example, attorney fees or damages for mental anguish.[14]

B. Shell's Constitutional Objection To The Consideration Of Prejudgment Interest In This Case Is Meritless.

Shell is also wrong in insisting that review is warranted here because the Oklahoma courts contra-

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[14] Shell also alleges that, in deciding cases about attorney fees, disgorgement, treble damages, and damages for mental anguish, courts have given different weight to how state legislatures have characterized the function of a particular kind of award. *See* Pet. at 16-18. None of the cases Shell cites involve awards of prejudgment interest. Nor, contrary to Shell's suggestion, Pet. at 15, did the decision in this case establish any legal principle in Oklahoma that statutory labels are conclusive for purposes of resolving a federal due process challenge to a punitive damages award. *Compare* Pet. App. 13a (adverting to statutory label in rejecting Shell's *state law* claim that punitive damages award was duplicative of allegedly punitive interest award) *with* Pet. App. 15a-16a (resolving constitutional claim without any reference to labels).

vened this Court's decisions by mischaracterizing the interest award in this case as compensatory damages for purposes of the *Gore* ratio analysis. That argument fails at its premise – Shell's characterization of the jury's award of prejudgment interest as a "heightened penalty," *see* Pet. at 21 (citation omitted), finds no support in the decisions of this Court, the Oklahoma statute, state and federal decisions interpreting that statute, or general principles governing prejudgment interest.

This Court has repeatedly explained that prejudgment interest "is an element of [plaintiff's] complete compensation." *West Virginia v. United States*, 479 U.S. 305, 310 (1987); *see also id.* at 310 n.2 ("Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress."); *Loeffler v. Frank*, 486 U.S. 549, 558 (1988) (stating that "[p]rejudgment interest, of course, is 'an element of complete compensation'") (*quoting West Virginia v. United States*, 479 U.S. at 310); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655 n.10 (1983) (explaining in a patent case that "[a] rule denying prejudgment interest not only undercompensates the patent owner but may also grant a windfall to the infringer and create an incentive to prolong litigation" and that "[t]here is no reason why an infringer should stand in a better position than a party who agrees to pay a royalty and then fails to pay because of financial difficulties"); *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933) (holding that interest from time of the taking is necessary to constitute adequate compensation under the Fifth Amendment); *Waite v. United States*, 282 U.S. 508, 509 (1931) (Holmes, J.) (holding that

interest should be allowed in order to make compensation "entire"); *Miller v. Robertson*, 266 U.S. 243, 258 (1924) (holding that prejudgment interest may be awarded "to arrive at fair compensation").

Shell has not shown that some special feature of the prejudgment interest statute specific to this case so departs from ordinary legislative attempts to compensate victims for the time value of their lost money that it must be treated as punitive for purposes of the *Gore* analysis.

In 1980, Oklahoma enacted OKLA. STAT. tit. 52, § 540B (West 1981) in order to establish guidelines for reporting oil and gas production and to require prompt distribution of oil and gas proceeds. The statute required operators to pay twelve percent (12%) per annum simple interest on oil and gas proceeds that were improperly withheld. In 1989, the statute was amended to provide interest at the rate of twelve percent (12%) per annum to be compounded annually. OKLA. STAT. tit. 52, § 540D (West 1991).[15] This interest is "an element of the . . . legal damage for the operator's default in payment." *Fleet v. Sanguine, Ltd.*, 854 P.2d 892, 900 (Okla. 1993). In 1980, when § 540 was enacted, the prime rate was over 15%, mortgage rates were over 13%, and the "IRS rate" was 12%.[16] The 12% interest rate did not operate as a penalty; it was a fair rate to compensate for the time value of money.

Shell nonetheless insists that "there can be no claim that 12% interest compensates for [Owners']

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[15] OKLA. STAT. tit. 52, § 540 was recodified in 1991 as part of the Production Revenue Standards Act, OKLA STAT. tit. 52, §§ 570.1-570.15 ("PRSA").

[16] *See supra* notes 5, 7, 8, and 9.

harm or represents the lost time-value of money," Pet. at 19, for several reasons, none of which has any merit.

First, Shell points out that the legislature at one point labeled the rate a "penalty." *Id.* But Shell itself insists that due process analysis cannot depend on "the label the State chooses to attach" to the interest award. *Id.* at 20. The Constitution is concerned with substance, not labels.

Second, Shell cites a decision from the Oklahoma Supreme Court characterizing the rate as intended to "compel compliance" in addition to provide "compensation." *Id.* at 19. But the fact that a rate provides an incentive to properly distribute trust funds does not, in itself, render an interest rate punitive – it simply reflects that any rate that does not at least provide full compensation for the time value of money gives wrongdoers a financial incentive to delay payment.

In fact, the purposes and application of PRSA interest are completely different from the purpose and application of punitive damages. Punitive damages may be awarded under OKLA. STAT. tit. 23, § 9.1 only if the jury finds by clear and convincing evidence that the defendant has acted with reckless disregard for the rights of others or has acted intentionally and with malice toward others. *See id.* § 9.1 B, C. In contrast, PRSA interest is awarded to a plaintiff without a showing of recklessness, intent, or malice. *Okland Oil Co. v. Conoco, Inc.*, 144 F.3d 1308, 1320 (10th Cir. 1998).

Thus, the PRSA's 12% prejudgment interest serves to compel compliance with the statute's requirement for prompt distribution of oil and gas proceeds. *See*

McClain v. Ricks Exploration Co., 894 P.2d 422, 431-32 (Okla. Civ. App. 1994). Punitive damages, on the other hand, are intended to provide "'a punishment for the benefit of society as a restraint upon the transgressor, and a warning and example serving as a deterrent to commission of like offenses in the future.'" *Maxwell v. Samson Res. Co.*, 848 P.2d 1166, 1172 (Okla. 1993) (*quoting Oller v. Hicks*, 441 P.2d 356, 360 (Okla. 1967)). There is no overlapping purpose between the award of PRSA compensatory interest and punitive damages awards such that they are duplicative.

Accordingly, in a case not cited by Shell, the Tenth Circuit determined Oklahoma PRSA interest is compensatory. *Okland Oil*, 144 F.3d at 1317. The Tenth Circuit concluded that "the jury may award prejudgment interest on top of the principal amount *in order to compensate for the detriment caused by the deprivation of the money*." *Id.* (emphasis added).

Third, in the end, Shell relies principally on the fact that another Oklahoma statute provides a lower rate for different kinds of cases. Pet. at 19. But, again, Shell itself recognizes that the Constitution cannot possibly impose different caps on punitive damages depending on the accident of what other rates each state provides for different kinds of claims. *Id.* at 20-21.

Nor can Shell seriously claim that 6% simple interest constitutes the maximum constitutionally allowable measure of the time value of Owners' money.[17]

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[17] In footnote 4, Pet. at 19, Shell incorrectly states that under the PRSA defendants who justifiably withhold payment based on a legitimate dispute over title pay only six percent *simple* interest rather than twelve percent compound interest. In fact,

After 35 years of inflation, the dollar that Shell took in 1974 was worth only 22 cents in 2008.[18] Using only simple interest (not compound interest), it would have require 10.3% interest just to keep pace with the rate of inflation (inflation is compound) from 1974 to 2007.[19] An interest rate barely above inflation "simply ensures that inflation does not erode the value of money;" it does nothing "to compensate for the lost use of the money in the intervening time."[20] As Shell's own financial experience demonstrates, Owners would have earned greater returns had the money been distributed to them on time when the oil and gas was produced.[21]

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the PRSA provides: "Where such proceeds are not paid because the title thereto is not marketable, such proceeds shall earn interest at the rate of six percent (6%) per annum to be *compounded annually*." OKLA. STAT. tit. 52, 570.10D (emphasis added).

[18] Bureau of Labor Statistics, CPI Databases (All Urban Consumers) http://www.bls.gov/cpi.

[19] Simple interest is calculated on the original principal amount, therefore the same amount of interest is earned every year on the principal. The rate of simple interest required just to compensate for inflation is calculated as follows: the CPI index (1967=100) for January 1974 is 139.7, the index for December 2007 is 629.17; adjusted for inflation, a 1974 dollar is worth $4.50 (629.17/139.7); the $3.50 difference equals .103 per year ($3.50 / 34 = .103), or 10.3% per annum.

[20] *State of Kan. v. State of Colo.*, No. 105, Original, 2000 WL 34508307, at *37 (U.S. Aug. 31, 2000) (quoting *United States v. City of Warren, Mich.*, 138 F.3d 1083, 1096 (6th Cir. 1998)); *see also Chandler v. Bombardier Capital, Inc.*, 44 F.3d 80, 84 (2d Cir. 1994) (same); *Clinchfield Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 895 F.2d 773, 780 (D.C. Cir. 1990) (same).

[21] *See* Shell Oil Company annual reports, SEC EDGAR System, http://www.sec.gov/edgar/searchedgar/webusers.htm; *see also* Plaintiffs' Tr. Exh. P240.32.

Shell attacks the use of compound interest without any attempt to relate its argument to the harm suffered by Owners. It cites two 19th century treatises for the proposition that compound interest is punitive. *See* Pet. at 20 n.5. But compound interest is the reality of today's financial markets – even a child's savings account earns compound interest.[22] It is settled law that fiduciaries like Shell are responsible for compound interest on funds improperly withheld from their beneficiaries when the fiduciary has earned profits in excess of the interest amount. RESTATEMENT (SECOND) OF TRUSTS § 207 (1959).[23]

Accordingly, the State's 6% simple interest rate is plainly less than what is necessary to provide victims complete compensation for their financial injuries.[24] That a defendant might receive a windfall with respect to interest in some cases says nothing about what the Constitution permits or prohibits with respect to punitive damages in this one.

Fourth, setting aside its plainly meritless reliance on the 6% simple interest provision, Shell has produced no evidence below, or in its petition here, establishing what constitutes the maximum rational measure of the time value of money. It apparently

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[22] "The court is prepared to take judicial notice that compound interest is a market or commercial reality for any corporation that does business in the United States." *ITT Corp. v. United States*, 17 Cl. Ct. 199, 242 (Cl. Ct. 1989).

[23] *See Fed. Sav. & Loan Ins. Corp. v. Quality Inns, Inc.*, 876 F.2d 353, 359 (4th Cir. 1989) (following the Restatement and holding that defendant "is liable as a trustee for compound prejudgment interest").

[24] Shell thus earned much more from the use of Owners' funds than the jury's verdict for compensatory damages. *See* note 22, *supra*.

expects this Court to intuit this figure from the Constitution itself, resolving a contentious matter of perennial debate among economists by judicial notice (or, more aptly, judicial fiat). And because the figure undoubtedly varies from state to state, and over time, Shell must expect that lower courts (supervised by this Court) will develop and maintain a constitutional interest matrix, something of a judicial version of the Consumer Price Index.

Even if courts were suited for such a task—which they obviously are not—it would make no difference here, because the Oklahoma legislature could rationally conclude that the 12% interest rate represents a reasonable compensatory measure. That interest rate falls within the range of rates used throughout the law for that purpose. For example, courts use the prime interest rate,[25] return on a prudent investment account,[26] and the IRS rate.[27]

Shell's claim thus fails even under its own proposed constitutional standard. Having asserted a

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[25] *See, e.g.*, *E.E.O.C. v. Erie County*, 751 F.2d 79, 82 (2d Cir. 1984) ("Since the goal of a suit under the FLSA and Equal Pay Act is to make whole the victims of the unlawful underpayment of wages, and since the adjusted prime rate has been adopted as a good indicator of the value of the use of money, it was well within the discretion of the district court to order that the rate of prejudgment interest to be paid by the defendants on the backpay awards be the adjusted prime rate.").

[26] *Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 301 (3d Cir. 2007) (holding in an ERISA case that "the measure of damages is the amount that affected accounts would have earned if prudently invested").

[27] *E.E.O.C. v. Guardian Pools, Inc.*, 828 F.2d 1507, 1512 (11th Cir. 1987) ("direct[ing] the district court to calculate an award of [prejudgment] interest based upon the IRS prime rates").

novel constitutional claim, Shell was required at the very least to come forward with evidence that the prejudgment interest award in this case exceeded the "historically accepted and currently reasonable estimate of" the injury inflicted upon Owners by virtue of the loss of the use of their money over the decades. Pet. at 24. It has not done so. If the Court is to identify a constitutional limit on cognizable prejudgment interest, it should await a case with a properly developed record and the likelihood that the Court's constitutional decision would make a difference to the outcome.

II. CERTIORARI IS UNWARRANTED TO RECONSIDER THE COURT'S CONSISTENT REFUSAL TO ADOPT RIGID MATHEMATICAL LIMITS ON PUNITIVE DAMAGES AWARDS.

Shell asks this Court to ignore the *Gore* multifactor analysis and establish a presumptive cap on punitive damages equal to the amount of any compensatory damages award in a case. Pet. at i. This Court has "consistently rejected invitations to invent a constitutional line marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." *Gore*, 517 U.S. at 582 (emphasis in original); *see also State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."). And it has consistently denied petitions asking the Court to reconsider that position. *See, e.g.*, *Cent. Fla. Invs., Inc. v. Myers*, No. 10-35, 2010 WL 3834443 (Oct. 4, 2010); *Superior Highwall Miners, Inc. v. Frye*, No. 09-1017, 130 S. Ct. 2354 (2010); *Fortis Ins. Co. v. Mitchell*, No. 09-854, 130 S. Ct. 1896 (2010); *DiamlerChrysler Corp. v. Flax*, No.

08-1010, 129 S. Ct. 2433 (2009); *Energen Resources Corp. v. Jolley*, No. 08-1001, 129 S. Ct. 1633 (2009).[28] Shell provides no basis for a different result here.

A. Shell Identifies No Certworthy Conflict Over Whether The Constitution Limits Punitive Damages Awards To An Amount Equal To Compensatory Damages.

Shell alleges that the courts are "squarely divided," Pet. at 27, over the application of this Court's statement in *State Farm* that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps

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[28] The Court has likewise consistently denied certiorari in other cases, including some cited by Shell, raising excessiveness challenges. *See, e.g., Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321-22 (11th Cir. 2007) (affirming a 5:1 ratio), *cert. denied*, 128 S. Ct. 2994 (2008); *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 645-50 (6th Cir. 2005) (reducing to a ratio of 2,150:1), *cert. denied*, 549 U.S. 946 (2006); *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949, 963 (9th Cir. 2005) (reducing to a ratio of 9:1), *cert. denied*, 547 U.S. 1111 (2006); *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 798, 802-03 (8th Cir. 2004) (reinstating a ratio of 224:1), *cert. denied*, 544 U.S. 1027 (2005); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed. Cir. 2003) (affirming a ratio of over 3:1), *cert. denied*, 540 U.S. 1183 (2004); *Zhang v. American Gem Seafood's, Inc.*, 339 F.3d 1020, 1044-45 (9th Cir. 2003) (affirming a ratio of slightly more than 7:1), *cert. denied*, 541 U.S. 902 (2004); *Union Pacific R.R. Co. v. Barber*, 149 S.W.3d 325, 347-50 (Ark.) (affirming a ratio of approximately 5:1), *cert. denied*, 543 U.S. 940 (2004); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 417-18 (Utah) (affirming a ratio of 9:1), *cert. denied*, 543 U.S. 874 (2004); *Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 803-04 (Wis.) (affirming a ratio of 7:1), *cert. denied*, 540 U.S. 1074 (2003).

only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. In particular, Shell alleges that the decision in this case conflicts with the law of the First, Sixth, and Eighth Circuits which, Shell claims, enforce a "1-to-1 benchmark as the presumptive constitutional norm where compensatory damages are substantial." Pet. at 27.[29]

But each of the cases Shell cites applies the three *Gore* guideposts for assessing punitive damage awards: "the reprehensibility of defendants' conduct, the disparity between plaintiffs' harm and the award, and a comparison of the award and civil penalties in comparable cases." *Bridgeport Music*, 507 F.3d at 486; *see also Bach*, 486 F.3d at 153 (applying the three guideposts); *Mendez-Matos*, 557 F.3d at 52 (same); *Williams*, 378 F.3d at 796-99 (same); *Boerner*, 394 F.3d at 602 (same). None purports to establish the constitutional rule Shell asks the Court to apply here. For example, the Sixth Circuit panel in *Bach* noted, "*[W]e would be wary of any attempt to graft our ruling here onto another set of facts. Ascertaining the constitutionally correct amount of punitive damages in a given case is a highly fact-intensive exercise, and the facts before us drive our conclusion in this case.*" 486 F.3d at 156 (emphasis added).

Indeed, it requires little effort to find cases from the same circuits Shell cites upholding punitive damages awards above the alleged 1:1 "presumptive

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[29] Pet. at 27-28 (citing *Bridgeport Music*, 507 F.3d 470; *Bach v. First Union Nat. Bank*, 486 F.3d 150 (6th Cir. 2007); *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36 (1st Cir. 2009); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004); and *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005)).

constitutional norm." Pet. at 27; *see Quigley v. Winter*, 598 F.3d 938, 954 (1st Cir. 2010) (concluding that a ratio of 4:1 was appropriate); *Gibson v. Moskowitz*, 523 F.3d 657, 664-65 (6th Cir. 2008) (upholding a ratio of 2:0); *Casillas-Diaz v. Palau*, 463 F.3d 77, 85-86 (1st Cir. 2006) (upholding a ratio of 3.33:1).

Far from creating a "presumptive constitutional norm," Pet. at 27, these cases simply reflect a case-specific application of *Gore* and *State Farm*. In every circuit and state, cases can be found carefully applying the fact-intensive complexity of the *Gore* guideposts and the *State Farm* considerations for reprehensibility with a variety of results, all within the framework provided for constitutionally acceptable punitive damage awards. The efforts of these courts do not represent conflict but thoughtful consideration post-*State Farm*.

B. There Is No Basis For This Court To Abandon Its Precedent And Establish An Arbitrary 1:1 Ratio.

From the inception of this Court's recognition of a substantive due process limitation on the size of punitive damages awards, the Court has instructed lower courts to consider the particular facts at hand, with reference to general guideposts, including the degree of reprehensibility of the conduct at issue, the disparity between the harm or potential harm suffered by a plaintiff and the punitive damages award, and the difference between the award and the civil penalties authorized. *Gore*, 517 U.S. at 575. Thus, the Court has repeatedly held that it "need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable." *Pac. Mut. Life Ins.*

Co. v. Haslip, 499 U.S. 1, 18 (1991); *see also Gore*, 517 U.S. at 582 (same) (quoting *Haslip*).[30]

Shell makes no pretense that any constitutional text or historic tradition would justify creation of a new constitutional right against punitive damages exceeding the amount of a compensatory award. Indeed, any such principle would call into question the constitutionality of the "long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish," *State Farm*, 538 U.S. at 425, the very tradition this Court relied upon to justify consideration of ratios in the first place. *See Gore*, 517 U.S. at 580-81.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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[30] If the Court were to grant certiorari in this case, it should affirm the decision below on the alternative ground that Shell's challenge is premised on precedent (*Gore* and *State Farm*) that should now be overruled in order to return the regulation of the size of punitive damages awards to the rightful control of the states and Congress.

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No. 10-349

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IN THE

Supreme Court of the United States

SHELL OIL COMPANY; SWEPI LP (AS SUCCESSOR-IN-INTEREST TO SHELL WESTERN E & P, INC.),
Petitioners,

v.

NANCY FULLER HEBBLE, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners Shell Oil Company and SWEPI LP (successor-in-interest to Shell Western E & P, Inc.) state that the corporate disclosure statement included in the petition remains accurate.

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Respondents.

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REPLY FOR PETITIONERS

The court below upheld a record-breaking $53 million punitive award based on the failure to pay $750,000. Attempting to obscure that staggering 71-to-1 ratio, the court defined the "compensatory" denominator to include $12.5 million in prejudgment interest imposed at a special *12% rate* applicable only to particular oil-and-gas cases. But 12% is *double* the ordinary prejudgment rate; far exceeds any conceivably appropriate benchmark; and was enacted expressly as a "penalty." Respondents characterize the rate as an "ordinary" effort "to compensate victims for the time value of their lost money." Yet they cannot explain why the time-value of money is 12% where the defendant is an oil-and-gas company but 6% for any other defendant. Nor can they explain how 12% com-

pound interest could be purely "compensatory" when inflation averages a third of that and ordinary interest averages about a half.

Respondents urge this Court not to look behind state-law labels. "Lower courts," they insist, "properly * * * confine[ ]" themselves to formal state-law labels and refuse any "federal" analysis that might "displace[ ] state lines between compensatory and punitive damages." Br. in Opp. 7. Some courts, including the court below, follow that approach. But many do the opposite: They decide whether an award is punitive or compensatory for due-process purposes based on its *substance*. Ignoring one side of that important conflict does not make it disappear. And this case starkly demonstrates the consequences of blindly deferring to state-law labels.

The courts are also divided on the presumptive maximum ratio in cases with substantial compensatory awards. In *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605 (2008), this Court recognized that relying solely on *Gore*'s verbal formulae without further numerical guidance made it "*inevitable* that the specific amount of punitive damages awarded by a judge or by a jury will be arbitrary" and suggested that "*[no]thing but a quantified approach will work.*" *Id.* at 2628, 2629 (emphasis added). *Amici curiae* Chamber of Commerce *et al.* (at 10-14), International Association of Defense Counsel and National Association of Manufacturers (at 3-6), Product Liability Advisory Council (at 5-12), and the American Petroleum Institute (at 8-15) demonstrate the devastating impact of the "widely divergent" approaches and the critical need for this Court's intervention. This case presents an ideal vehicle for resolving that conflict as well.

I. State And Federal Courts Are Divided Over How To Calculate The Punitive-To-Compensatory Damages Ratio

The punitive-to-compensatory damages ratio is the most commonly cited indicator of an excessive punitive damages award. *BMW* v. *Gore*, 517 U.S. 559, 580 (1996); API Br. 7. Yet courts are divided over how to decide whether a particular recovery goes into the ratio's numerator or denominator. As respondents acknowledge (at 7), many courts treat formal state-law labels as dispositive. But other courts look to the award's *substance* and *function* to decide, as a *federal* constitutional matter, whether an award should be considered "compensatory" because it "'will compensate the injured party for the injury sustained, *and nothing more*,'" *McMillian* v. *FDIC*, 81 F.3d 1041, 1055 (11th Cir. 1996) (quoting *Black's Law Dictionary* 270 (6th ed. abridged 1991) (emphasis added)), or "punitive" because it imposes additional costs on the defendant for deterrence, *Bridgeport Music, Inc.* v. *Justin Combs Publ'g*, 507 F.3d 470, 489 (6th Cir. 2007).

A. Respondents concede that the court below accepted Oklahoma's state-law "compensatory" label as dispositive, declining to analyze whether 12% compound interest is in substance compensatory for due-process purposes. Ignoring that omission, respondents attack (at 10-12) the strawman argument that prejudgment interest is *never* "compensation." But the petition does not argue that.[1] And respondents' effort to characterize 12% compound interest as purely "compensatory" is unavailing.

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[1] The petition does explain why prejudgment interest might be excluded from the ratio *even if* it is "compensatory." For example, including prejudgment interest in the ratio perversely punishes stale claims more severely. Pet. 23-24. Moreover, the Constitution permits punitive damages only to punish *the defendant's* misconduct.

Noting that inflation and interest rates were high in one year—1980—respondents assert that 12% compound interest is an "ordinary" effort "to compensate victims for the time value of their lost money." Br. in Opp. 12. But that purported compensatory goal cannot explain why Oklahoma left the statutory rate for all *other* economic damages at 6%, while forcing oil-and-gas defendants to pay twice that amount. Pet. 14. The time-value of money to "compensate" the plaintiff cannot be 6% if the defendant is a banker, optician, or car dealer, but 12% if the defendant is an oil company.

Moreover, 12% compound interest far exceeds any relevant benchmark. Average inflation for the past half-century is less than 4%; no decade in that period has averaged over 7.5%.[2] Even the prime rate (Br. in Opp. 12, 17) has averaged far closer to 6% than to 12%—both during the last half-century and between 1989 and 2008, when Oklahoma imposed 12% compound interest on Shell.[3] Respondents' claim (at 15) that "the dollar that Shell took in 1974 was worth only 22 cents in 2008" proves our point. If respondents are correct—and indulging the erroneous assumption that all $750,708 accrued in 1974—the amount Shell withheld would at most be equivalent to $3.4 million today. A $53 million punitive

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Imposing punitive damages on prejudgment interest punishes the defendant for the interest rate and plaintiff's delay in filing suit—neither of which reflects the defendant's culpability. API Br. 16-17. And it makes no sense to deny prejudgment interest on punitive damages, but award punitive damages on prejudgment interest, since the results are mathematically identical. *Id.* at 23-24. Respondents ignore those arguments.

[2] See InflationData.com, *Average Annual Inflation by Decade*, http://inflationdata.com/inflation/Inflation/DecadeInflation.asp.

[3] See Federal Reserve Release, http://www.federalreserve.gov/releases/h15/data/Annual/H15_PRIME_NA.txt.

damages award on $3.4 million in compensation *still* yields a double-digit 15-to-1 ratio that defies this Court's precedents. The Oklahoma legislature itself understood 12% interest was a "penalty" when enacting it in 1980. See Pet. 7, 15. And respondents cite *no State in the Nation* that uses a 12% baseline for time-value of money.

Respondents contend (at 13) that 12% compound interest is not "punitive" but "an incentive" to "compel compliance." But "compensation" by definition seeks to make the plaintiff whole, not impose additional costs to alter the defendant's conduct. See Pet. 18 (citing *Black's Law Dictionary*); *McClain* v. *Ricks Exploration Co.*, 894 P.2d 422, 431-432 (Okla. Civ. App. 1994) ("12% interest * * * is in the nature of a *penalty to compel compliance*" (emphasis added)). One could just as easily urge that steep fines and incarceration are not "punishment" but mere "incentives" to "compel compliance." Respondents (at 14) attribute such reasoning to the Tenth Circuit in *Okland Oil Co.* v. *Conoco, Inc.*, 144 F.3d 1308, 1320 (1998). But that underscores the need for review: The Sixth Circuit has rejected that approach. *Bridgeport*, 507 F.3d at 489 (deterrent disgorgement remedy—which "prevent[ed] the infringer from unfairly benefiting from a wrongful act"—was "punitive").[4]

Besides, cases like *Okland* and *Purcell* v. *Santa Fe Minerals, Inc.*, 961 P.2d 188 (Okla. 1998), address whe-

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[4] Respondents urge (at 13) that PRSA interest is "completely different" from punitive damages because it is awarded regardless of scienter or culpability. But the PRSA exempts non-payment based on a justifiable title dispute from heightened 12% interest. Pet. 19 n.4. If the 12% rate were compensation for plaintiffs, not punishment for defendants, the claimed justification would be irrelevant. Besides, 100% daily interest imposed solely on one group of defendants would not suddenly become "compensatory" merely because it was imposed without fault.

ther PRSA interest is a "penalty" for purposes of *Oklahoma* law. *Purcell* overturned the Oklahoma Supreme Court's earlier conclusion that 12% interest was a "penalty," *Fleet* v. *Sanguine, Ltd.*, 854 P.2d 892, 899-900 (Okla. 1993), based solely on the Oklahoma legislature's removal of the words "as the penalty" from the statute with no change to the statute's substance. *Purcell*, 961 P.2d at 193; Pet. 15. Unless one accepts respondents' claim that only state-law labels matter, those cases prove nothing.

B. In any event, respondents' assertion that 12% compound interest is genuinely compensatory is irrelevant because the court below never evaluated that issue. Instead, it simply followed Oklahoma's formal state-law label. The correctness of that approach is what divides the courts. Respondents urge (at 7) that "[l]ower courts * * * have confined" themselves to state-law labels, refusing to perform a functional "federal" analysis that might "displace[ ] state lines between compensatory and punitive damages" when calculating the *Gore* ratio. But they ignore the many other cases holding that an award is not automatically "compensatory" merely because the legislature said so. Pet. 17-19; *e.g.*, *Bridgeport*, 507 F.3d at 489. Those cases look to the award's substance and hold that, if it provides more than the plaintiff lost, it encompasses "a punitive element." Pet. 17-19. Many state supreme courts likewise reject state-law labels for constitutional purposes when nominally "compensatory" awards incorporate a "punitive" component. See, *e.g.*, *Roby* v. *McKesson Corp.*, 219 P.3d 749, 768-769 (Cal. 2009); *Tony Gullo Motors I, L.P.* v. *Chapa*, 212 S.W.3d 299, 308 (Tex. 2006). So does this Court. See *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 426 (2003)

(putatively compensatory awards sometimes contain a "punitive element").

Respondents make no effort to reconcile that conflict. Their bald assertion (at 10) that the "cases do not set forth any general approach to distinguish between compensatory and punitive damages that would put them at odds with each other" is devoid of supporting analysis. And respondents miss the point in dismissing (at 9) myriad contexts in which the issue arises (treble damages, attorney's fees, capped damages) as "involv[ing] legal questions that are not presented in this case." That the same problem arises in many contexts underscores the issue's *importance*. The division over whether an award's character as "punitive" or "compensatory" should be resolved solely by reference to state law (as respondents contend), or whether instead federal principles play some role (as we contend), cuts across every one of those contexts.

Respondents urge that this Court "should avoid" looking behind formal state-law labels when determining whether an award is compensatory or punitive for due-process purposes, characterizing it as "an anchorless endeavor." Br. in Opp. 7. But respondents would render anchorless the ratio that has been an important part of this Court's due-process analysis. For example, while Oklahoma's and Alabama's oil-and-gas-payment prejudgment interest statutes are "virtually identical," Alabama determined that its 12% interest statute *is* "penal in nature," and rejected Oklahoma's contrary approach. *Ala. Dep't of Conservation & Natural Res.* v. *Exxon Mobil Corp.*, 11 So. 3d 194, 200-201 (Ala. 2008).[5] It cannot be

[5] Just as the label "penalty" was originally in but later removed from Oklahoma's statute, the term "penalty" appeared in the title of the originally enacted Alabama bill but not in re-enacting legislation.

that, because the two States place different labels on otherwise identical statutes, an Oklahoma jury can impose more than $50 million in punitive damages here without violating due process, while an Alabama jury hearing the same facts would flagrantly violate it by awarding even a fraction of that amount. See IADC/NAM Br. 6-7. In other constitutional contexts, courts look to the *substance* of state law, "no matter how the State labels it." *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002); see Pet. 20. If the "Constitution is concerned with substance, not labels," Br. in Opp. 13, courts must do so here as well. Respondents' contrary view produces the bizarre result that, the "more punitive the interest rate, the greater additional punishment that can be imposed on top of it as punitive damages." API Br. 22.

Retreating to hyperbole, respondents raise the specter of this Court promulgating the constitutional equivalent of the Consumer Price Index. Br. in Opp. 17. But the reasons for excluding exceptional prejudgment interest (and perhaps all prejudgment interest and other add-ons)—that they are unrelated to the culpability of the conduct being punished, see p. 3 n.1, *supra*—have nothing to do with any particular rate. Moreover, this Court need not second-guess statutorily determined interest rates to prevent States from padding the ratio's denominator with patently punitive sums. It need only disapprove unjustified reliance on arbitrary labels where meaningful analysis shows the award punitive in substance and function. That should provide discipline

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Ala. Dep't of Conservation, 11 So. 3d at 200. Although "Oklahoma courts no longer refer[red] to [PRSA] as a 'penalty' provision" after the word "penalty" was deleted, the Alabama Supreme Court concluded that deleting the word "penalty" did not render 12% interest any less "penal in nature." *Id.* at 201 & n.6.

enough. Respondents' proposal, by contrast, would render *Gore*'s ratio so manipulable as to be useless.[6]

II. The Courts Are Divided On The Presumptive Benchmark For The Punitive-To-Compensatory Damages Ratio

This Court has repeatedly observed that, when compensatory damages are substantial, a 1-to-1 ratio may be "the outermost limit." *State Farm*, 538 U.S. at 425; see *Exxon Shipping*, 128 S. Ct. at 2626, 2634 n.28. Taking that guidance seriously, many courts (like the First, Sixth, and Eighth Circuits) "have used a 1:1 ratio" as the presumptive "benchmark when compensatory damages are substantial." *Jurinko* v. *Med. Protective Co.*, 305 F. App'x 13, 28, 30 (3d Cir. 2008); see Pet. 27-28 (citing *Bridgeport*, 507 F.3d at 488; *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 154-156 (6th Cir. 2007); *Mendez-Matos* v. *Municipality of Guaynabo*, 557 F.3d 36, 53-56 (1st Cir. 2009); and *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004)). By contrast, other courts have adopted 4-to-1 or even 9-to-1 as the presumptive "proxy for the limits" of due process, adjusting upwards from there. Pet. 28 (quoting *Planned Parenthood* v. *Am. Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005)); *id.* at 29-30 & n.8 (citing *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003); and *Seltzer* v. *Morton*, 154 P.3d 561 (Mont. 2007)).

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[6] Although conceding that this issue was fully preserved, respondents suggest (at 16-17) that "evidence" of whether 12% is "compensatory" is insufficiently developed. This Court regularly relies on related statutory provisions and uncontested historical facts like those cited by the petition, invoked by respondents, and relied upon by the parties below. The notion that a trial court should "take evidence" on such incontrovertible matters defies common sense and was never urged below.

Respondents assert (at 20) that those courts all apply the same test—"the three *Gore* guideposts." But respondents cannot deny that those courts have adopted conflicting *presumptions*. Some start with a presumptive 1-to-1 limit and move up from there based on special considerations; others start at 4-to-1, or more, and move up from there. And despite respondents' assertion (at 20) that factual differences justify the dramatically differing outcomes, respondents never identify a single such difference (much less a meaningful one). For example, the petition (at 29) explains that the Sixth Circuit's decision in *Bridgeport* and the Federal Circuit's decision in *Rhone-Poulenc* "squarely conflict on their facts." Respondents offer no response. The fact is that 1-to-1 is now a predictable lodestar in many courts, with departures only for particularly egregious conduct or other special circumstances. See *Bach*, 486 F.3d at 156. Yet other courts start with a presumptive 4-to-1 or 9-to-1 ratio even if the "behavior is not particularly egregious." *Planned Parenthood*, 422 F.3d at 962; see *Rhone-Poulenc*, 345 F.3d at 1372. Those different starting points lead to different multi-million dollar outcomes for otherwise identical conduct. Pet. 31.

Respondents deny (at 20-21) the conflict by invoking three cases in which the First, Sixth, and Eighth Circuits upheld ratios exceeding 1-to-1. But the point is not that courts have adopted 1-to-1 as an *absolute* outer limit. The point is that, while some courts expressly recognize 1-to-1 as the *presumptive* limit—to be exceeded only when compensatory damages are insubstantial or conduct is particularly egregious—others begin with a much higher presumptive limit. Thus, the First, Sixth, and Eighth Circuit cases invoked by respondents (at 21) all involved the sort of lingering death, brutal and inten-

tional physical harm, or less-than-substantial recovery identified as grounds for departing upward from a presumptive 1-to-1 limit.[7] And the fact that respondents' primary answer to extensive inter-circuit conflict is to claim intra-circuit confusion underscores the need for this Court's guidance. Currently, "the outer limits of due process differ greatly depending on the fortuity of where and in what court a case happens to be decided." PLAC Br. 3. The claim that the identity of the panel also matters is little comfort.

Finally, respondents urge (at 18-19 & n.28) that this Court has previously declined opportunities to provide needed clarity. But the conflict has grown in scope and importance, as the many *amicus* briefs (IADC/NAM, Chamber of Commerce, PLAC, API) attest. This Court, moreover, recently observed that "a quantified approach" is necessary to avoid "arbitrary" results in the admiralty context. *Exxon Shipping*, 128 S. Ct. at 2628, 2629. Experience now proves that observation correct for due-process cases as well. The inadequacy of prior vehicles is no basis for allowing conflicting approaches on the presumptive benchmark to persist forever. This case presents the conflict squarely. The time for review is now.

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[7] In *Casillas-Diaz* v. *Palau*, 463 F.3d 77, 80, 85-86 & n.4 (1st Cir. 2006), the defendants "brutally beat[ ]" the plaintiffs and the court upheld only a 2-to-1 ratio on $250,000 in compensatory damages for one plaintiff and, for the plaintiff who recovered a relatively insubstantial $50,000, a 10-to-1 ratio. Similarly, *Gibson* v. *Moskowitz*, 523 F.3d 657, 664-665 (6th Cir. 2008), upheld a 2-to-1 ratio where the "multi-day wrenching facts" showed that the victim died of slow dehydration, losing "40 pounds over four and a half days." And *Quigley* v. *Winter*, 598 F.3d 938, 953-955 (8th Cir. 2010), involved a less-than-substantial monetary award. The defendant's prolonged sexual harassment forced the plaintiff to abandon her residence but caused only $13,685 in damages; the courts still *reduced* punitive damages to 4-to-1.

* * * * *

For the foregoing reasons and those set forth in the petition and *amicus* briefs, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SHELL OIL COMPANY; SWEPI LP (AS SUCCESSOR-IN-INTEREST TO SHELL WESTERN E & P, INC.),
Petitioners,

v.

NANCY FULLER HEBBLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMICUS CURIAE THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 37.2 of the Rules of this Court, the American Petroleum Institute (API) moves for leave to file the accompanying brief as amicus curiae in support of petitioners. Counsel for petitioners has consented to the filing of this brief; counsel for respondents has not.

Amicus curiae is a national non-profit trade association that represents over 400 members collectively engaged in all aspects of the petroleum and natural gas industry.

API has a particular interest in this litigation because of the potential adverse effects of the decision below on the petroleum and natural gas industry. As frequent litigants and frequent targets of large punitive damages awards, API's members have a strong interest

in ensuring the predictability and fairness of punitive damages awards. The arbitrary and excessive award affirmed by the Oklahoma Court of Civil Appeals is directly contrary to those constitutional values and exemplifies a trend that is particularly troublesome to API's members. In addition to violating defendants' due process rights, unpredictable punitive awards and incoherent review of such awards hamper innovation and undermine effective business and litigation planning.

Amicus curiae's considerable interest in ensuring the constitutional application of punitive damages awards gives it a strong interest in the resolution of the questions raised by the petitioners in this case. Accordingly, amicus curiae respectfully requests leave to file the attached brief.

Respectfully submitted,
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NANCY FULLER HEBBLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

BRIEF FOR AMICUS CURIAE THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONERS

Amicus curiae the American Petroleum Institute (API) respectfully submits this brief in support of petitioners.[1]

[1] Counsel for each party was informed at least 10 days prior to this brief's due date of amicus curiae's intention to file this brief. Counsel for petitioners consented to the filing of this brief; counsel for respondents did not. Accordingly, amicus is filing herewith a motion for leave to file this brief pursuant to Rule 37.2 of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No per-

INTEREST OF AMICUS CURIAE

The American Petroleum Institute (API) is a national non-profit trade association that represents over 400 members collectively engaged in all aspects of the petroleum and natural gas industry.

API has a particular interest in this litigation because of the adverse effects that the decision below will have on the petroleum and natural gas industry. A recent survey found that companies in the energy and chemical industry are among the most frequent bearers of "blockbuster" (at least $100 million) punitive damages awards. See Alison F. Del Rossi & W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damages Awards*, 12 Am. L. & Econ. Rev. 116, 126 tbl.2 (2010). Unpredictable punitive awards, moreover, hamper innovation and undermine effective business and litigation planning. Amicus curiae thus has a considerable interest in ensuring that punitive awards are guided by uniform constitutional standards and are otherwise consistent with constitutional limits.

This case exemplifies the unpredictable punitive damages awards, far out of proportion to any wrongdoing committed by the defendant, to which amicus curiae's members are frequently subjected. Between 1973 and 1985, petitioner Shell failed to pay approximately $750,000 in "net profits" from an oil-and-gas lease. In 1995, respondents sued Shell in Oklahoma district court seeking actual and punitive damages. Shell asserted a statute of limitations defense, which was

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son other than amicus curiae or its counsel made a monetary contribution to the brief's preparation or submission.

tried to the jury; the amount of net profits if due was not contested. At the close of the liability phase of trial, the jury awarded respondents $13.2 million, reflecting the uncontested $750,000 in net profits plus prejudgment interest of $12.45 million, calculated almost entirely at Oklahoma's "special" 12% compounding interest rate for nonpayment on oil and gas leases. Okla. Stat. tit. 52, § 570.10 (2010). At the punitive damages stage, the jury awarded $53.6 million. The total award, arising out of $750,000 in withheld net profits, was $66.05 million. The Oklahoma district court upheld the punitive damages award, and the Oklahoma Court of Civil Appeals affirmed. The appellate court's purportedly *de novo* review of the constitutionality of this $53 million punitive award consisted entirely of two paragraphs in which the court simply observed that the punitive award was just over four times the amount of the jury's total award at the compensatory stage of trial, inclusive of prejudgment interest. Such grossly disproportionate punitive awards, and the lack of rigorous judicial review, are, unfortunately, all too common for API's members.

REASONS FOR GRANTING THE WRIT

This Court's decisions acknowledge the constitutionally problematic nature of punitive damages. Left largely to their own discretion, guided only by general principles, juries are subject to improper influences, such as passion and bias against large, out-of-state corporations. The absence of clear rules regarding the circumstances in which punitive damages will be awarded, or in what amounts, is inconsistent with the fundamental constitutional guarantees of fair notice and predictability regarding punishments.

In recognition of those constitutional concerns, this Court has held out *de novo* judicial review as a protection against unconstitutional deprivations of property and the key to providing the guidance regarding the imposition of punitive damages that will allow potential defendants to organize their affairs. But the general principles that this Court has articulated for lower courts to apply have failed to provide the necessary predictability. And, as the Court recently acknowledged in *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2628 (2008), mere "verbal formulations" can never do so; instead, only clear numerical benchmarks can provide the constitutionally required protection against arbitrary punishment. The Court should grant the petition and establish in clear terms the constitutional benchmark that, where actual damages are substantial, punitive damages should not exceed a 1:1 ratio to the compensatory award.

The Court should also grant the petition to clarify whether prejudgment interest that bears no direct relation to the conduct of the defendant to be punished can be included in the denominator of the comparative ratio. For punitive damages to serve their important, but limited, function of punishing and deterring misconduct, they must be assessed only with reference to the conduct the State seeks to punish. By including in the "compensatory damages" denominator prejudgment interest at a rate of 12% compounded, which does not reflect any assessment of the defendant's conduct, the court below severed the relationship between the punitive damages and the character of the conduct to be punished.

I. ALTHOUGH *DE NOVO* REVIEW OF PUNITIVE DAMAGES AWARDS IS CONSTITUTIONALLY MANDATED, REVIEWING COURTS FAIL IN THEIR CONSTITUTIONAL ROLE DUE TO THE ABSENCE OF CLEARER GUIDANCE FROM THIS COURT

Although this Court has long accepted that "punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition," *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568 (1996)) ("*Gore*"), the Court has simultaneously recognized that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994). The Court has therefore imposed both "procedural and substantive constitutional limitations" on the imposition of punitive damages awards. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416 (2003).

One important constitutional protection is that punitive damages awards must receive *de novo* judicial review. *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). Because the standard of review is constitutionally derived, state courts must undertake *de novo* review as well. *State Farm*, 538 U.S. at 418.

The promise of *de novo* review, however, has not been realized in practice. Standards articulated at a high level of generality and loose references to acceptable ratios have given lower courts little clear guidance. Further guidance from this Court regarding the proper role of the ratios in the constitutional analysis, and their relationship to the nature of the defendant's con-

duct, is essential for *de novo* review to fulfill its constitutionally mandated function.

A. *De Novo* Review Is Critical To A Constitutional System Of Jury-Imposed Punitive Damages

Punitive damages awards raise "fundamental due process concerns" related to the "risks of arbitrariness, uncertainty, and lack of notice." *Philip Morris USA* v. *Williams*, 549 U.S. 346, 354 (2007). "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. Punitive damages awards, however, pose a high risk of violating these constitutional norms. Although they "serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm*, 538 U.S. at 417. In particular, because they are assessed, in the first instance, by juries, there is a distinct risk that punitive awards will be tainted by passion and bias, particularly "biases against big businesses * * * without strong local presences." *Ibid.* (quoting *Honda Motor*, 512 U.S. at 432).

Because of these concerns, the Court has held that reviewing courts must "apply a *de novo* standard of review when passing on [trial] courts' determinations of the constitutionality of punitive damages awards." *Cooper Indus.*, 532 U.S. at 436. "Exacting appellate review" of jury-awarded punitive damages is necessary to ensure that punitive damages remain within constitutional limits and "that an award of punitive damages

is based upon an 'application of law, rather than a decisionmaker's caprice.'" *State Farm*, 538 U.S. at 418 (quoting *Cooper Indus.*, 532 U.S. at 436).

In adopting the *de novo* review requirement, the Court explained that only such judicial review could provide the fair notice and predictability required by the Constitution. *De novo* review allows appellate courts "to maintain control of, and to clarify, the legal principles" as well as to "unify precedent" and "stabilize the law." *Cooper Indus.*, 532 U.S. at 436 (quoting *Ornelas* v. *United States*, 517 U.S. 690, 697-698 (1996)). The Court further recognized that "general criteria," such as the guideposts identified in *Gore*, acquire "meaningful content" through the process of "case-by-case application at the appellate level." *Ibid.* In addition to providing citizens adequate "notice of what actions may subject them to punishment," "[r]equiring the application of law, rather than a decisionmaker's caprice * * * helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." *Ibid.* (internal quotation marks and citation omitted). In the absence of *de novo* review, the goals of clarity, unity, and stabilization that are essential to the fair notice and predictability required by due process are unfulfilled, and the framework that allows the imposition of punitive damages in a constitutional manner ceases to exist.

As demonstrated below, there remains a dearth of guidance to cabin juries' passions or ensure consistency across judgments. Without this Court's further guidance, there can be no constitutionally adequate system of assessing punitive damages.

B. The Court's Current Guidance Lacks Sufficient Clarity To Provide The Tools For Meaningful *De Novo* Review

1. As the Court has recognized, generalized standards alone are inevitably insufficient to protect against arbitrary and unpredictable punitive damages awards. *Exxon*, 128 S. Ct. at 2628. Unlike compensatory damages, which are "tied to specifically proven items of damages," *ibid.*, punitive damages calculations based on only general criteria cannot produce the notice and predictability the Constitution requires.

In *Exxon*, in the context of a punitive award imposed under maritime federal common law, the Court considered and ultimately rejected the adequacy of "verbal formulations" of general standards to ensure "against unpredictable outlier[]" punitive damages awards. 128 S. Ct. at 2628. The Court acknowledged that "[u]nder the umbrellas of punishment and its aim of deterrence, degrees of relative blameworthiness are apparent" and could be identified. *Id.* at 2621-2622 (noting maliciousness, intentional injury, harm inflicted for financial gain, and hard-to-detect wrongdoing as examples). The Court also noted attempts by several States to utilize "criteria for judicial review," such as the "degree of heinousness" and "a reasonable relationship to the compensatory damages awarded." *Id.* at 2627 (quoting *Bowden* v. *Caldor, Inc.*, 710 A.2d 267, 277-284 (1998)). After reviewing these approaches and jury "instructions offering, at best, guidance no more specific for reaching an appropriate penalty," the Court expressed its "skeptic[ism] that verbal formulations * * * are the best insurance against unpredictable outlier[]" punitive damages awards. *Id.* at 2627-2628.

The Court noted that the judicial experience in the criminal context was similar. The pre-Sentencing Guidelines "system of general standards," which left judges with "relatively unguided discretion to sentence within a wide range," had "defied consistency." *Exxon*, 128 S. Ct. at 2628.

The current system of punitive damages is, as the *Exxon* Court aptly observed, even worse than the pre-guidelines sentencing regime. Lacking anything comparable to a "'punitive-damages guidelines'" or "even a statutory maximum," "it is *inevitable* that the specific amount of punitive damages awarded by a judge or by a jury will be arbitrary." *Exxon*, 128 S. Ct. at 2628-2629 (emphasis added) (quoting *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003)).

In *Exxon*, the Court's review of failed attempts to cabin punitive awards led it to conclude that only "a quantified approach will work." *Exxon*, 128 S. Ct. at 2628. The Court adopted a strict 1:1 ratio as the upper limit for punitive damages in maritime cases. *Id.* at 2633. The Court relied on the fact that "the median ratio of punitive to compensatory awards has remained less than 1:1" and that the "real problem" was "the stark unpredictability of punitive awards." *Id.* at 2624-2625. The Court stressed that the range of punitive damages between those less than 1:1 and the "fully 14% of punitive awards in 2001 * * * greater than four times the compensatory damages" did not reflect "refin[ed]" judgments about the "optimal level of penalty and deterrence," nor did they produce "consistent results in cases with similar facts," but instead evidenced "'the inherent uncertainty of the trial process.'" *Id.* at 2625-2626 (quoting *BMW of N. Am., Inc.* v. *Gore*, 646 So.2d 619, 626 (Ala. 1994) (*per curiam*)).

Although *Exxon* was decided under the Court's federal common-law authority, the decision noted, without answering, the possible "constitutional significance of the unpredictability of high punitive awards" on which the Court's analysis and holding was based. 128 S. Ct. at 2627. Indeed, it would seem to follow necessarily that the same unpredictability of a system based on only "verbal formulations" that led the Court in *Exxon* to adopt a numerically grounded system as a matter of common law should likewise lead the Court to reject "verbal formulations" as adequate as a constitutional matter. As noted above, the Court has repeatedly stressed that the due process guarantee does not permit a system of punitive damages that is incapable of providing defendants with "fair notice" of the "severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. The same arbitrariness that condemned a system of general principles and "verbal formulations" as a matter of common law also makes that same system intolerable under the Constitution.

2. This case demonstrates the inadequacy of the Court's current approach of "guideposts" and "factors." See *State Farm*, 538 U.S. at 418-419. Loose reference to acceptable ratios and even looser reference to general standards to be considered have reduced supposed *de novo* review to an abuse-of-discretion review under which courts feel free to uphold virtually any punitive damages award. The Oklahoma appellate court's punitive damages review is emblematic of many reviewing courts' inability to effectuate *de novo* review of punitive awards without stronger guidance.

Here, the Oklahoma appellate court provided only two paragraphs of non-analysis. That court made no attempt whatsoever to evaluate the guideposts in

terms of the legitimate purposes of punitive damages or whether the large punitive award might have reflected improper considerations. Instead of analyzing whether Shell's conduct represented a degree of reprehensibility that could justify a punitive damages ratio far in excess of the 1:1 ratio that this Court indicated might be "the outermost limit of the due process guarantee" when "compensatory damages are substantial," *State Farm*, 538 U.S. at 425, the Oklahoma Court of Civil Appeals terminated its review after stating simply (and incorrectly) that this Court had approved a dramatically higher ratio in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993). According to the Oklahoma court, the ratio in this case was 4:1, which

> compares favorably with that in *TXO* * * *, where the jury awarded $19,000.00 in actual damages arising from the defendant's baseless claim on plaintiff's oil and gas interests and $10,000,000.00 in punitive damages. Proportionately, Shell has received a much lighter sanction.

App., 15a-16a.

The decision below reflects the continuing pernicious effect of the *TXO* decision. This Court has repeatedly clarified that the relevant comparison in *TXO* was the ratio between the punitive award and the large potential loss to the plaintiffs that could have resulted if the defendant's fraudulent scheme had been successful (which made the ratio between 2.5:1 and 10:1, not 526:1). 509 U.S. at 462; *Gore*, 517 U.S. at 581. Nevertheless, lower courts continue to exploit the facts while ignoring the law of *TXO* to justify punitive damages far

in excess of those *State Farm* and *Gore* contemplate in the absence of exceptional circumstances. See, *e.g.*, *Goff* v. *Elmo Greer & Sons Constr. Co.*, 297 S.W.3d 175, 194 (Tenn. 2009), cert. denied, 130 S. Ct. 1910 (2010) (citing *TXO* as affirming "a punitive damage award that was 526 times as great as the compensatory damages"); *Modern Mgmt. Co. v. Wilson*, 997 A.2d 37, 47-48 (D.C. 2010) (characterizing *TXO* ratio as 526:1). Indeed, these decisions prove correct Justice Scalia's prediction that "the great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that 'this is no worse than *TXO*.'" *TXO*, 509 U.S. at 472 (Scalia, J., concurring in judgment).

Many courts, like the Oklahoma court here, treat any ratio that can be characterized as within single digits, where there is even the least degree of reprehensibility, as *per se* constitutional. *E.g.*, *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003), cert. denied, 541 U.S. 902 (2004) ("We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case."); *Trinh* v. *Gentle Commc'ns, LLC*, 881 N.E.2d 1177 (Mass. App. Ct. 2008).

By assuming that any punitive damages award within the ratios that the Court has identified as the "outer limits" of what the Constitution will tolerate is acceptable, courts substitute a deferential, abuse-of-discretion-type analysis that looks to whether *any* reprehensibility factor is present and the award is within a single-digit ratio. Without searching, *de novo* review of whether the ratio applied appropriately reflects the reprehensibility of the defendant's conduct in the given

case or whether the denominator in the ratio is the proper measure of the defendant's sanctionable misconduct, punitive damages awards are often arbitrary and unpredictable, and therefore inconsistent with fundamental due process requirements.

C. The Promise Of *De Novo* Review Can Be Achieved Only Through Clarification Of The Critical Character Of The Ratios, Especially The 1:1 Ratio, And The Relationship Between Them

The promise of *de novo* review—providing clarity, predictability, a check on abuse and caprice, and consistency across punitive damages awards—has not been realized because reviewing courts lack the tools to discern and develop the meaningful content that might, over time, fulfill the constitutional function this Court has assigned to the *de novo* standard. The decision below, and those like it, illustrate the correctness of this Court's conclusion in *Exxon* that multifactor, nebulous approaches do not provide the clarity and certainty, 128 S. Ct. at 2628, that due process requires and to which *de novo* review aspires. Instead, due process review of punitive damages awards must be rooted in numerical benchmarks.

This Court has already intimated at those benchmarks and the several factors that warrant gradation between them, as well as the limited circumstances in which departure from the ratio benchmarks may be appropriate. For the reasons discussed above, however, the Court must clarify and strengthen that guidance. The Court has frequently referenced different benchmarks, but done so in language that fails to convey just how critical those numerical touchstones must be to

lower courts' *de novo* review of punitive damages awards. Rather, the Court's repeated references to eschewing "a mathematical bright-line," *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991), or "a simple mathematical formula," *Gore*, 517 U.S. at 582, have led lower courts to conclude that they are free to eschew this Court's statements about the significance of the numerical benchmarks. See, *e.g.*, *Mitchell* v. *Fortis Ins. Co.*, 385 S.C. 570, 588 (2009), cert. denied, 130 S. Ct. 1896 (2010).

The Court's discussion in *State Farm* illustrates both the proper analysis and how imprecisely phrased caveats in the Court's opinions allow lower courts to largely ignore that analysis. In *State Farm*, the Court recognized that, apart from egregious circumstances, in a case with substantial compensatory damages a "ratio * * * equal to compensatory damages * * * reach[es] the outermost limit of the due process guarantee." 538 U.S. at 425. Yet the Court couched that recognition in qualified language that many lower courts have seized upon as a reason to ignore the 1:1 ratio altogether. See *ibid.* ("When compensatory damages are substantial, then a lesser ratio, *perhaps* only equal to compensatory damages, *can* reach the outermost limit of the due process guarantee." (emphasis added)); see, *e.g.*, *Ragland* v. *Digiuro*, --- S.W.3d ---, No. 2009-CA-186, 2010 WL 4137183, at *12 (Ky. App. Oct. 22, 2010) ("However, we believe the Supreme Court's choice of ambiguous terms, such as 'substantial' and 'lesser ratio' and 'outermost limit' and 'perhaps,' was intended to facilitate our 'considerable flexibility in determining the level of punitive damages.'" (quoting *Gore*, 517 U.S. at 568)). Indeed, the Court's reference to the Constitution permitting "few awards *exceeding* a single-digit ratio,"

State Farm, 538 U.S. at 425 (emphasis added), has encouraged some lower courts, as noted above, to believe that a single-digit ratio automatically blesses a particular punitive award. See, *e.g.*, *Perrine* v. *E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 895 (W. Va. 2010) ("[A]ny punitive damages award that is in single digits would presumptively be within the constitution.").

As the Court's analysis in *Exxon* demonstrates, 128 S. Ct. at 2628, only clear guidance regarding firm numerical benchmarks and the factors that warrant gradation of a punitive damages award between those breakpoints can provide a foundation for a punitive damages system that satisfies the due process requirements of fair notice and predictability.

II. Prejudgment Interest That Does Not Measure A Defendant's Reprehensible Conduct Should Be Excluded From The Ratio Of Punitive To Compensatory Damages

As the Court has observed, the "imposition of punitive damages is an expression of moral condemnation." *Cooper Indus.*, 532 U.S. at 432. Operating as "private fines," punitive damages "punish" the defendant's misconduct and "deter future wrongdoing." *Ibid.* As such, the "focus[]" in a court's *de novo* review of a punitive damages award must always be "the degree of the defendant's reprehensibility or culpability." *Id.* at 435. This Court's review of the awards in *Cooper Industries* and other recent punitive damages cases demonstrates that a critical function of a court in conducting that required *de novo* review is to ensure that the punitive award is compared to the "relevant" figure measuring "the harm caused by [the defendant's] tortious con-

duct." See *id.* at 441-442. As those decisions reflect, the "fundamental due process concerns" of "arbitrariness, uncertainty and lack of notice" require that punitive damages be based only on the defendant's own conduct and its direct consequences. *Philip Morris*, 549 U.S. at 354.

Many courts, like the Oklahoma court below, continue to misunderstand the significance of that responsibility. The Court should grant the petition for certiorari to clarify that only compensatory damages directly attributable to the reprehensible conduct that is to be punished are to be included in the comparative part of the *de novo* analysis. Because prejudgment interest does not reflect harm directly attributable to the defendant's wrongful conduct—and interest at a 12% penalty rate plainly does not—it should be excluded from the ratio of punitive to compensatory damages.

A. For The *Gore* Ratio To Serve Its Function, The Denominator Must Include Only Harm Directly Attributable To The Conduct To Be Punished

This Court's decisions make clear that the reprehensible nature of the defendant's conduct is the ultimate foundation of any punitive damages award. A punitive damages award can only be justified in relation to the State's interest in "punishing unlawful conduct and deterring its repetition." *Philip Morris*, 549 U.S. at 352 (quoting *Gore*, 517 U.S. at 568). Thus, "punitive damages should only be awarded if the defendant's culpability," after fully compensating the plaintiff, "is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419. Reprehensibility, in other

words, is the threshold requirement for any award of punitive damages, and "the degree of reprehensibility of the defendant's conduct" is "the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575.

The "second" and "most commonly cited" guidepost in assessing the excessiveness of a punitive damages award is the "ratio" of the punitive damages "to the actual [or potential] harm inflicted on the plaintiff." *Gore*, 517 U.S. at 580. The function of the ratio is to ensure that "the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff." *Philip Morris*, 549 U.S. at 353 (paraphrasing *Gore*). Thus, the ratio, like the reprehensibility factor itself, focuses on "the defendant's actions" and the harm they caused. *Cooper Indus.*, 532 U.S. at 435.

This Court's opinions confirm that the compensatory damages that serve as the denominator in the *Gore* ratio must be limited to damages that flow from the conduct that the State has a legitimate interest in "punishing." In *Philip Morris*, for example, the Court ruled that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." 549 U.S. at 353. Likewise, a "defendant's dissimilar acts, independent from the acts upon which liability is premised, may not serve as the basis for punitive damages." *State Farm*, 538 U.S. at 422-423.

A court's *de novo* review therefore requires it to determine whether the "harm" that the plaintiff proposes as the relevant comparator is "attributable to [the] misconduct" that the state seeks to punish and deter. *Cooper Indus.*, 532 U.S. at 442. In *Cooper Indus-*

tries, the Court remanded for a new *de novo* review by the court of appeals because the "wrongdoing" that was the premise of the punitive damages award—the defendant's misleading use of the plaintiff's tool in marketing materials—"could not be treated as the principal cause" of the "potential harm" the plaintiff proposed as the relevant comparator. *Ibid.*

The reviewing court must also ensure that the "compensatory damages" comparator does not already incorporate a punitive element beyond the actual damages directly caused by the defendant's sanctionable conduct. Thus, for example, the Court explained in its assessment of the 145-to-1 ratio in *State Farm* that the ratio arguably understated the extent of the disparity because the plaintiffs' compensatory damages for emotional distress already reflected "the outrage and humiliation" resulting from the defendant's conduct, which "duplicated [ ] the punitive award." 538 U.S. at 426.

As these decisions make clear, the ratio of punitive damages to compensatory damages is only instructive to the court's *de novo* review if the denominator is limited to those damages that flow directly from the conduct that the state seeks to punish. Elements of the plaintiff's ultimate recovery, such as prejudgment interest (particularly at a punitive 12% rate), that are not directly related to the misconduct that gives rise to the punitive damages award must therefore be excluded from the ratio.

B. Prejudgment Interest Does Not Reflect The Defendant's Conduct That Warrants Punishment

1. The "compensatory damages" that provide the denominator of the *Gore* ratio are those damages "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Indus.*, 532 U.S. at 432; see *McEvoy Travel Bureau, Inc.* v. *Norton Co.*, 408 Mass. 704, 718 (1990) (noting that "actual damages" are losses "flowing directly from a wrongful act"). The determination of the "actual damages suffered," the Court has recognized, "presents a question of historical and predictive fact" that is tried to the jury. *Cooper Indus.*, 532 U.S. at 437 (quoting *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996)). Prejudgment interest, by contrast, is not a question of the "concrete loss" caused by the defendant's "wrongful conduct." Nor, in most states, is prejudgment interest decided by the jury at all, but is instead imposed by the court (or the clerk). See, *e.g.*, *d'Arc Turcotte* v. *Estate of LaRose*, 153 Vt. 196, 200 (1989) ("The question of interest is not properly within the province or discretion of the fact-finder."); *Grove* v. *Myers*, 181 W. Va. 342, 347 (1989); *DiMeo* v. *Philbin*, 502 A.2d 825, 826 (R.I. 1986) (per curiam). Because prejudgment interest does not measure a "historical fact" of injury to the plaintiff caused by "the defendant's wrongful conduct," it must be excluded from the comparative analysis.

Even in those cases, such as this one, in which the jury is asked to calculate prejudgment interest, the resulting figure does not represent the harm to the plaintiff caused by the defendant's wrongful conduct. The jury in this case was not asked to determine the oppor-

tunity cost to respondents, as a matter of historical fact, that resulted from Shell's failure to pay net profits. Rather, the statute itself specified a compounded rate of 12%, without regard to any evaluation of the time value of money during the relevant period. Okla. Stat. tit. 52, § 570.10. Nor did the statute require the jury to make any individualized finding of Shell's culpability in causing the delay in payment.[2] Instead, by the statute's terms, the fact of the delay was itself sufficient for interest to accrue at a 12% compounding rate. *Ibid.* Inclusion of prejudgment interest in the ratio thus makes the relationship between the punitive damages award and the "the degree of reprehensibility of the defendant's conduct," *Gore*, 517 U.S. at 575, even more tenuous.

In most instances, where prejudgment interest is calculated by the court at the time judgment is entered, it would not form part of the compensatory basis that the jury or trial judge would consider as they assess the relationship between punitive and compensatory damages. Thus, in most jurisdictions, assuming *arguendo* that Shell's conduct warranted a 4:1 ratio of punitive to compensatory damages, the punitive damages award would have been $3,000,000. To have prejudg-

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[2] The amount of interest due was significantly increased by delays attributable to respondents' failure to initiate suit until 1995, and the courts' failure to try the case until May 2008. Pet. App., 4a-5a. There is no suggestion that Shell improperly delayed the adjudication of this case. Even if Shell had caused delay, that was not the "wrongful conduct" for which the punitive damages were imposed, and thus should have been excluded from the denominator. See *Cooper Indus.*, 532 U.S. at 441 (limiting comparison to "the harm caused by Cooper's tortious conduct").

ment interest included in the punitive damages denominator in states in which the jury does the math, but excluded where the judge makes the calculation, introduces additional opportunity for arbitrariness in an already unpredictable system of punitive damages and flouts the "elementary notions of fairness enshrined in our constitutional jurisprudence" that a person have "fair notice" of both the punishable conduct and the potential severity of the penalty. See *Gore*, 517 U.S. at 574.

Because prejudgment interest does not reflect the defendant's conduct or the harm directly inflicted by it, inclusion of prejudgment interest in the denominator is inconsistent with the constitutional analysis. Fully 90% of the $13.2 million compensatory damages figure the court below used for comparison purposes had no direct relationship to the defendant's punishable conduct. The punitive award here punishes Shell in the absence of responsibility or control, see *State Farm*, 538 U.S. at 422, thereby violating the fundamental due process concerns of fair notice and non-arbitrary application of the law. Cf. *United States* v. *Bornstein*, 423 U.S. 303, 312 (1976) (excluding, in context of tallying culpable acts for purposes of imposing penalties under the False Claims Act, instances of wrongdoing that were "completely fortuitous and beyond [the defendant's] knowledge or control").

In this case, including prejudgment interest in the ratio is particularly problematic because the State's 12% compounding interest rate was manifestly punitive in its own right. Its inclusion in the *Gore* ratio duplicated the State's interest in punishment and deterrence. At the very least, including the punitive prejudgment interest award in the *Gore* ratio should have

decreased the permissible ratio based on the fact that the State has already imposed punishment. Instead, as applied by the Oklahoma courts: The more punitive the interest rate, the greater additional punishment can be imposed on top of it as punitive damages. That is exactly backwards. See *State Farm*, 538 U.S. at 426. The presence of prior punishment through an enhanced interest rate (or likewise multiple statutory damages) should draw into question whether further additional punishment is warranted or permissible at all—not serve as justification for increasing the amount of further punishment that can be piled on.

2. Including prejudgment interest in the denominator of the *Gore* ratio is particularly arbitrary because it permits courts to evade the longstanding prohibition against awarding prejudgment interest on punitive damages. Most states, including Oklahoma, do not permit prejudgment interest on punitive damages awards. See Okla. Stat. tit. 12, § 727 (2009); *Johnson* v. *Ford Motor Co.*, 45 P.3d 86, 95 (Okla. 2002); see also Alaska Stat. § 09.30.070 (2010) ("Prejudgment interest may not be awarded for * * * punitive damages."); Ind. Code § 34-51-4-3 (2010); *d'Arc Turcotte*, 153 Vt. at 200; Restatement (Second) of Torts § 913 cmt. d (1979) ("Interest is not allowable as an element in punitive damages."). Courts have explained several reasons for this rule. First, awarding prejudgment interest on punitive damages compounds the penalty. See *Fortino* v. *Quasar Co.*, 950 F.2d 389, 398 (7th Cir. 1991); *McEvoy*, 408 Mass. at 717. Second, calculating prejudgment interest on a punitive damages award is inappropriate because the plaintiff's right to punitive damages does not arise until judgment is entered. See, *e.g.*, *Wheeler Motor Co.*

v. *Roth*, 315 Ark. 318 (1993); *Dees* v. *Am. Nat'l Fire Ins. Co.*, 861 P.2d 141 (Mont. 1993).

Despite the consensus that prejudgment interest does not apply to punitive damages, including prejudgment interest in the denominator of the *Gore* ratio, as the courts below did, is the functional and mathematical equivalent. Because the multiplication of numbers does not depend on the order in which they are multiplied, it does not matter whether the compensatory award is first multiplied by the *Gore* ratio and then multiplied by the rate of prejudgment interest (which is forbidden) or whether the compensatory award is first multiplied by the rate of prejudgment interest and then multiplied by the *Gore* ratio, as the lower court did here. The outcome is the same, and it should be precluded by whichever route.

Using a slightly simplified version of the facts of this case demonstrates the point. Assuming that the constitutionally permissible *Gore* ratio in this case is 4:1, then if the punitive damages were deemed owing at the time of the wrongful conduct in 1985 and, contrary to Oklahoma law, prejudgment interest was assessed on the punitive damages, the total award to plaintiffs would have been $63,750,000. (Compensatory damages on $750,000 of actual harm would result in $3,000,000 in punitive damages, and applying the State's punitive 12% compounding prejudgment interest rate to the full $3,750,000 from 1985 would reach $63,750,000 by 2010.) The court below reached the same improper result but in a different order. Applying 12% compounding interest to the $750,000 in actual damages for twenty-five years produces $12,750,000. Applying a 4:1 ratio to this inflated figure yields a punitive award of $51,000,000—for a total of $63,750,000. The resulting award, in other

words, was the mathematical equivalent of precisely what Oklahoma law forbids.

Had the Oklahoma court started with the compensatory award of $750,000, awarded four times that amount as punitive damages, and then calculated prejudgment interest only on the compensatory portion of the award, the Hebble's entire award would have totaled only $15,750,000 ($750,000 multiplied by 12% compound interest, plus $3,000,000 in punitive damages). By first calculating prejudgment interest and then applying the *Gore* ratio to that inflated amount, the courts below gave respondents an approximately $48 million windfall. So arbitrary an award is inconsistent with the constitutional guarantees that *de novo* judicial review is supposed to protect. The Court should grant the petition and reverse this arbitrary award.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 10-349

IN THE SUPREME COURT OF THE UNITED STATES

SHELL OIL COMPANY; SWEPI LP (AS SUCCESSOR-IN-INTEREST TO SHELL WESTERN E & P, INC.),
Petitioners,

v.

NANCY FULLER HEBBLE, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, STATE CHAMBER OF OKLAHOMA, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONERS

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On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of this Court, *amici curiae* request leave to file the accompanying brief in support of the above-referenced Petition for a Writ of Certiorari.[1]

[1] Respondents' counsel did not consent to the filing of an *amici* curiae in this action. Petitioners consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. Per Rule 37.2, counsel of record for all parties received notice at least ten days prior to the due date of *amici's* intention to file this brief. Per Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its

As associations that represent businesses of all sizes, *amici* have a substantial interest in ensuring that the determination of punitive damages awards is fair, predictable, and reflects sound public policy, and that such awards are subject to careful appellate review.

Amici seek leave to file a brief in this case because of the continued lack of consistency in application of this Court's punitive damages jurisprudence. Despite this Court's laudable efforts to provide guidance to lower courts as to how to evaluate whether a punitive damage award is excessive, courts reach widely varying results in similar cases. The level of variability that persists can mean the difference between affirming a punitive damage award of $750,000, $53.6 million, or more. Such results hardly provide defendants with the notice and proportionality required by due process.

The proposed brief will show that the decision of the Oklahoma Court of Civil Appeals in this case is emblematic of several ways that lower courts have failed to follow this Court's rulings on punitive damages or have struggled in interpreting their constitutional obligations. The brief will show that the decision below is an example of how some courts have conducted only a cursory review of the Court's mandate to evaluate the reprehensibility of the conduct at issue.

The proposed brief will then examine how lower courts deciding the maximum constitutionally-sustainable ratio of punitive-to-compensatory dam-

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members, or its counsel made a monetary contribution to the preparation or submission of the brief.

ages have differed on how much amounts to a "substantial" compensatory damage award for which this Court has said that a one-to-one ratio is appropriate. The difference in result between application of a 1:1, 4:1, or 9:1 ratio, particularly in cases involving hundreds of thousands or millions of dollars in compensatory damages, is breathtaking. Moreover, by including such elements as prejudgment interest, attorneys' fees, costs, and statutory or treble damages on the compensatory side of the equation, courts may improperly sustain punitive damage awards that would otherwise be deemed excessive.

Amici submit the proposed brief to bring to the Court's attention the profound significance of these issues, and demonstrate the need for guidance from this Court. Civil defendants, including *amici's* members, often have little or no notice of the potential scope of such liability. *Amici*, therefore, respectfully urge this Court to hear this case and provide clear instruction for lower courts to follow.

* * *

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three-hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch. To that end, the Chamber has filed more than 1,700 *amicus curiae* briefs in cases of vital concern to the nation's business com-

munity. For over 20 years, the Chamber has participated as an *amicus* in all of this Court's most significant punitive damages cases, including *Exxon Shipping Co. v. Baker* (2008), *Philip Morris USA v. Williams* (2007), *State Farm Mut. Auto Ins. Co. v. Campbell* (2003), *BMW of N. Am., Inc. v. Gore* (1996), *Pacific Life Ins. Co. v. Haslip* (1991), and *Browning-Ferris Indus. v. Kelco Disposal* (1989).

The State Chamber of Oklahoma ("State Chamber") is a business membership organization that has over 2,000 membership locations, representing over 400,000 employees. Currently, 50 percent of the State Chamber's members have 12 or less employees, and 75 percent of our members have less than 100 employees. The State Chamber is a unique, nonpartisan organization. It is the only organization in Oklahoma to represent all types of business and industry in all parts of the state. In addition to businesses, the State Chamber represent schools, foundations, trade associations, local chambers of commerce and other nonprofit organizations which drive our economy. The State Chamber's goal is to make Oklahoma the state of choice for business.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues, including constitutional, common law, and statutory requirements for punitive damage awards.

* * *

Accordingly, a*mici* ask the Court to grant their Motion.

Respectfully submitted,

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Dated: November 12, 2010

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INTEREST OF *AMICI CURIAE*[1]

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400,000 employees. Currently, 50 percent of the State Chamber's members have 12 or less employees, and 75 percent of our members have less than 100 employees. The State Chamber is a unique, non-partisan organization. It is the only organization in Oklahoma to represent all types of business and industry in all parts of the state. In addition to businesses, the State Chamber represent schools, foundations, trade associations, local chambers of commerce and other nonprofit organizations which drive our economy. The State Chamber's goal is to make Oklahoma the state of choice for business.

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STATEMENT OF THE CASE

Amici adopt Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

Due process requires that defendants have "fair notice . . . of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). In a series of cases, this Court has required a *de novo* review of the evidence supporting a punitive damage award, and, while avoiding a "bright line" approach, provided factors for courts to

apply when evaluating whether such an award is excessive. Nevertheless, there is still a level of variability that can mean the difference between affirming a punitive damage award of $750,000, $53.6 million, or more. Such potential outcomes hardly provide defendants with the proportionality and predictability required by due process.

A bevy of lower state courts have treated this Court's rulings on fair notice as if they do not exist. They have ignored the letter of the Court's rulings, their spirit, or both. The result has turned punitive damage justice into a nationwide lottery game. The Court should hear this case and make its punitive damage rules meaningful.

This is why this case provides the vehicle to achieve this goal. It involves the Petitioner's failure to pay net-profits interest on a single contract to a single party. This decision below encompasses several ways that lower courts have failed to follow this Court's rulings on punitive damages or have struggled in interpreting their constitutional obligations. It provides an example of how some courts have conducted only a cursory review of the Court's mandate to evaluate the reprehensibility of the conduct at issue. Proper appellate review of the reprehensibility of the defendant's conduct is a key element in evaluating the maximum supportable compensatory damages multiplier. Careful evaluation of reprehensibility ensures that the measure of punishment is reasonable and proportionate to the defendant's wrongful conduct.

Factors for evaluating the defendant's conduct set forth by this Court in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), include whether

the harm was economic or physical, placed safety at risk, or involved a single incident or repeated conduct, are cast aside. The court below, at best, gave lip service to one factor, a finding of deceptive conduct that permits a punitive damage award in the first place.

A second way the court below ignored this Court's rulings on punitive damages focuses on the ratio between punitive and compensatory damages. This Court has provided instructions on how lower courts should evaluate the maximum permissible ratio. As the instant case reflects, rulings purporting to apply those instructions reflect more confusion than clarity. Courts have allowed vastly deviating awards for similar conduct.

Courts fail to apply standards as to what amounts to a "substantial" compensatory damage award for which this Court has said that a one-to-one ratio of punitive to compensatory damages is appropriate. Here, the court below applied a 4:1 ratio to $750,000 in lost payments of net-profits, adding $12.5 million in pre-judgment interest computed at an already penal 12% rate. The difference in result between application of a 1:1, 4:1, and 9:1 ratio, particularly in cases involving hundreds of thousands or millions of dollars in compensatory damages, is breathtaking.

The instant case also reflects the fact that lower courts are a patchwork quilt in what they count as "compensatory" for purposes of applying the multiplier. Plaintiffs often manipulate the ratio between punitive and compensatory damages by inflating the denominator to include prejudgment interest, attorneys' fees, costs, and statutory or treble damages in

order to improperly justify a punitive damage award that would otherwise be deemed excessive.

For the foregoing reasons, *amici* respectfully urge the Court to grant certiorari in this case and provide standards that promote greater predictability, consistency, and fairness in civil litigation.

ARGUMENT

I. COURTS HAVE FAILED TO PROVIDE CONSTITUTIONALLY MEANINGFUL APPELLATE REVIEW OF PUNITIVE DAMAGE AWARDS

This Court has "instructed courts evaluating a punitive damages [award] . . . to consider three criteria." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001). These guideposts include (1) the reprehensibility of the defendant's conduct; (2) the size of the punitive damage award compared with the actual or potential harm to the plaintiff; and (3) a comparison of the punitive damage award to "civil or criminal penalties that could be imposed for comparable misconduct." *Gore*, 517 U.S. at 583.

This Court did not say that it had merely suggested three *Gore* factors to be applied by lower courts determining the excessiveness of a punitive damage award. Rather, the Court "instructed" courts to consider these factors. *See Cooper*, 532 U.S. at 440. Nevertheless, some courts, such as the court below, recite the criteria, then disregard it. Such review more closely resembles an abuse of discretion approach than a proper reexamination of the evidence supporting the award.

For instance, the Court has found that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575. In *Campbell*, this Court provided five considerations for determining the level of reprehensibility, including whether (1) the harm caused was physical as opposed to economic; (2) the defendant's indifference to or reckless disregard of the health or safety of others; (3) the plaintiff's financial vulnerability; (4) the defendant's conduct involved repeated actions or an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit. 538 U.S. at 419. "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damage award; and the absence of all of them renders any award suspect." *Id.*

The decision below is an example of how some courts disregard considerations that would weigh against a substantial punitive damage award and instead hone in on a single factor that arguably supports it.

The presence of a single reprehensibility factor cautions against application of a high compensatory damages multiplier. For instance, the Sixth Circuit has found that "where only one of the reprehensibility factors is present, a ratio in the range of 1:1 or 2:1 is all that due process will allow." *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 487 (6th Cir. 2007) (finding deceitful conduct in that defendant released album in derogation of plaintiff's copyright by ignoring pre-litigation letters, but that other factors were not present and case involved solely economic harm); *see also Bach v. First Union Nat'l*

Bank, 486 F.3d 150, 155-56 (6th Cir. 2007) (finding that while plaintiff constituted a vulnerable victim, the absence of other factors "significantly undercuts [the plaintiff's] attempts to justify a ratio of 5.57:1 and ruling that $400,000, an amount equal to compensatory damages, was the constitutional limit for the punitive damage award). By this reasoning, when a court evaluates only one reprehensibility factor, and disregards the rest, it has not properly evaluated whether a punitive damage award satisfies due process. This is precisely what occurred in the court below.

It is particularly inappropriate for courts to place undue emphasis on the fifth *Gore* factor, the presence of intentional malice, trickery, or deceit, as the lower court did in this case. In some states, a threshold level of malice or deception is the very trigger for an award of punitive damages under state law. Its absence would preclude any such award. *See, e.g.*, Utah Code Ann. § 78-18-1(1)(a) (requiring malice or fraud or reckless indifference toward, and a disregard of, the rights of others); *Jonathan Woodner, Co. v. Breeden*, 665 A.2d 929 (D.C. 1995), *cert. denied*, 519 U.S. 1148 (1997) (requiring malice for award of punitive damages); *Owens-Illinois v. Zenobia*, 601 A.2d 633 (Md. 1992) (same). Current Oklahoma law permits an award of punitive damages of no more than $100,000 or an amount equal to actual damages when a defendant acts with reckless disregard for the rights of others; no more than $500,000 or twice actual damages or the amount of the increased financial gain where a jury finds by clear and convincing evidence that the defendant acted with malice; and a higher amount only where there is evidence beyond a reasonable doubt that the de-

fendant acted intentionally and with malice and engaged in life-threatening conduct. Okla. Stat. Ann. tit. 23, § 23-9.1.

In this case, the court below found that the presence of intentional deceit demonstrated "heightened" reprehensibility and thereby justified a more significant punitive damage award than would otherwise be constitutionally permitted. *See* App. at 15a. This type of conclusory reasoning does not constitute a sufficient evaluation of reprehensibility according to the rules set by this Honorable Court.

The court below went even further disregarding the careful appellate review required by this Court. In the instant case, four of the five factors plainly weighed against a finding of highly reprehensible conduct. The harm was purely economic, not physical. The defendant did not commit an act of violence, threaten bodily harm, or place anyone's health or safety at risk. The conduct did not target a particularly susceptible party, such as an elderly or disabled person, or someone otherwise financially vulnerable. Rather, the conduct involved a failure to pay net-profits interest on a single contract to a single party.

In sum, the Oklahoma appellate court ignored all but one of the reprehensibility factors. It solely relied upon the presence of deceit to find the conduct highly reprehensible. The court's ruling, if allowed to stand, would invite derogation of the obligation to conduct a thorough appellate review. Moreover, it would lend credence to the theory that a *quadrupling* of damages is warranted in any case involving statutory violations or tort claims that include an element of deception, regardless of significant differences in

the parties, the type of injury involved, or the plaintiff's actual damages.[2]

This Court should clarify that *de novo* review requires evaluation of each reprehensibility factor and that the failure to do so is reversible error. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 63-65 (2d Cir. 2004) (finding a $2.1 billion punitive damage award, which was equal to the amount of compensatory damages and prejudgment interest, was insufficiently supported where the district court "simply stated without elaboration that '[c]onsidering the re-

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[2] In addition to conducting a cursory reprehensibility analysis, the lower courts have ignored, discounted, or otherwise failed to faithfully apply the third *Gore* factor, which evaluates excessiveness of a punitive damage award based on the "civil or criminal penalties that could be imposed for comparable misconduct." *Gore*, 517 U.S. at 583; *see generally* Victor E. Schwartz *et al.*, *Selective Due Process: The United States Supreme Court Has Said that Punitive Damages Must be Reviewed for Excessiveness, but Many Courts are Failing to Follow the Letter and Spirit of the Law*, 82 Or. L. Rev. 33 (2003). Approximately two-thirds of state deceptive trade practices statutes authorize private parties to recover an award of treble damages. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kansas L. Rev. 1, 23-24 (2005). Treble damages are typically computed three times *actual* damages, without regard to prejudgment interest. The Oklahoma Consumer Protection Act, however, provides that an aggrieved consumer may recover actual damages, the costs of litigation including reasonable attorneys' fees, and, if the act or practice is found to be "unconscionable," a civil penalty of up to $2,000 for each violation. *See* Okla. Stat. Ann. tit. 15, § 761.1. Notably, Oklahoma law provides criteria for determining unconscionability that are similar to the factors adopted by this Court for evaluating reprehensibility. *See id.* Thus, had the appellate court considered comparable civil or criminal penalties, this factor would have weighed against the magnitude of the punitive damage award in this case.

prehensibility of defendants' conduct in this case, the Court perhaps would be justified in imposing an award of punitive damages several fold the amount of actual damages awarded'").

II. GUIDANCE ON THE PERMISSIBLE PUNITIVE TO COMPENSATORY DAMAGE RATIO WOULD END VAST INCONSISTENCY, AND PROVIDE GREATER PREDICTABILITY AND FAIRNESS IN THE CIVIL JUSTICE SYSTEM

Selection of the maximum sustainable ratio of punitive to compensatory damages is not only complicated by the failure of lower courts to conduct a thorough reprehensibility analysis, it is exacerbated by confusion as to what constitutes a "substantial" award of compensatory damages. Further, manipulation of what is included as "compensatory" damages for the purposes of applying the multiplier can lead to drastically different outcomes on the same or similar facts. As this Court has recognized, the "stark unpredictability of punitive awards" and "outlier verdicts" are antithetical to due process. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008).

The essence of this Court's punitive damage jurisprudence is that the measure of punishment must be reasonable and proportionate to the amount of harm to the plaintiff resulting from the defendant's wrongful conduct. *See Gore*, 517 U.S. at 580. For this reason, the ratio between punitive and compensatory damages is "the most commonly cited indicium of an unreasonable or excessive punitive damages award." *Gore*, 517 U.S. at 580.

In avoiding a "bright-line" ratio, the Court has provided the following guidance on the ratio between punitive and compensatory damages:

- "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of due process guarantee." *Campbell*, 538 U.S. at 425.
- A 4:1 ratio "might be close to the line of constitutional impropriety." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991); *Gore*, 517 U.S. at 581. This reflects 700 years of history of "providing for sanctions of double, treble, and quadruple damages to deter and punish." *Campbell*, 538 U.S. at 426.
- Higher ratios are appropriate only where "a particularly egregious act has resulted in a small amount of economic damages" and in "cases in which the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine." *Gore*, 517 U.S. at 582.
- "[F]ew awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425.

The problem, as reflected in the decision below, is that many lower courts are either ignoring or manipulating the guidelines. A fundamental reason for this Court to review this case is to let those lower courts appreciate that these are constitutional guidelines, not mere suggestions.

A. Courts Widely Diverge on How Much is a "Substantial" Compensatory Award

In light of the Court's guidelines for determining the appropriate ratio, whether the compensatory damages awarded are considered "substantial" is particularly important. Even courts that are trying to adhere to the guidelines are widely divergent in their approach.

Many courts have found that awards in the range of the $750,000 in net-profit payments here (not including the $12.5 million award of pre-judgment interest) are "substantial" and generally warrant no more than a one-to-one ratio. *See, e.g., Bach*, 486 F.3d at 155-56 (ruling that $400,000, an amount equal to compensatory damages, was the constitutional limit for the punitive damage award involving purely economic harm); *Williams v. Conagra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (in hostile work environment claim, ordering reduction of $6 million punitive damage award to $600,000, reflecting the amount of the plaintiff's compensatory damages, because "[s]ix hundred thousand dollars is a lot of money"); *Zakre v. Norddeutsche Landesbank Girozentrale*, 541 F. Supp.2d 555, 565-67 (S.D.N.Y. 2008) (ordering reduction of $2.5 million punitive damage award to $600,000, upon consideration of the substantial $1.5 million compensatory award for lost wages and emotional distress in gender discrimination and retaliation claim and other *Gore* factors); *Hudgins v. Southwest Airlines, Co.*, 212 P.3d 810, 829 (Ariz. Ct. App. 2009) (ordering remittitur of $4 million punitive award to each plaintiff to $500,000, reflecting the substantial compensatory damages awarded for emotional distress, in case in which

bounty hunters authorized to carry guns by airline were prosecuted).

Some courts view amounts significantly less than $750,000 as "substantial." *See, e.g., Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 54 (1st Cir. 2009) (ordering remittitur of $350,000 punitive damage award to $35,000 to reflect amount of compensatory damages because the defendant's conduct was not "particularly egregious" and although "compensatory damage award was not excessive, it did amply compensate" the plaintiff for his mental distress); *Thomas v. Istar Financial, Inc.*, 508 F. Supp.2d 252, 263 (S.D.N.Y. 2007) (ordering remittitur of $1.6 million punitive damage award to an amount equal to the $190,000 compensatory award for lost wages, which the court considered "a very substantial amount").

Where an amount is not "substantial," but is not "nominal," some courts view a 4:1 ratio as the appropriate limit. *See, e.g., Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 362 (8th Cir. 2009) (involving a $30,000 compensatory award in a retaliation case); *Quigley v. Winter*, 598 F.3d 938, 955-56 (8th Cir. 2010) (ordering remittitur of a $250,000 punitive damage award to four times the plaintiff's $13,685 in compensatory damages in sexual harassment cases against landlord); *Lithia Motors, Inc. v. Yovan*, 204 P.2d 572, 583 (Or. Ct. App. 2009) (reducing $100,000 punitive damage award to $2,000, where $500 award for noneconomic damages for mental anguish "is not insubstantial in the sense that it has actual value in excess of the $200 nominal damage award" provided by statute).

In some cases, however, courts sustain significantly higher ratios, even when there is a large com-

pensatory damage award. The *Campbell* case itself is such an example. In *Campbell*, a nationwide insurer was found to have engaged in bad faith in defending one of its insureds in a wrongful death suit. The trial court awarded the plaintiffs $1 million in compensatory damages and $145 million in punitive damages. This Court characterized the compensatory damage award as "substantial" and providing "complete compensation" for a year and a half of emotional distress. 538 U.S. at 426. It reversed the $145 million punitive damage award and remanded with instructions that "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425. The Court also found that there were no factors justifying a breach of this guidepost, as the case involved minor economic injuries, and no physical injury, assault or trauma, and the damages already contained a punitive element *See id.* at 426.

Nevertheless, on remand, the Utah Supreme Court approved a totally inappropriate 9:1 ratio. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 418 (Utah), *cert. denied*, 543 U.S. 874 (2004). In so doing, the Utah Supreme Court opted to apply the single digit maximum that this Court stated was appropriate for cases involving a particularly egregious act resulting in small financial losses, or where the injury is hard to detect or it is difficult to determine the monetary value of noneconomic harm. *See* 538 U.S. at 425.

There are other examples of courts upholding 9:1 ratios even with sizable compensatory damage awards, *see, e.g., Boeken v. Philip Morris Inc.*, 127

Cal. App.4th 1640, 1703 (Cal. Ct. App. 2005), *cert. denied*, 547 U.S. 1018 (2006) (reducing punitive damage award from $100 million to $50 million where plaintiffs' compensatory damages were $5.5 million to reflect a 9:1 ratio), or regarding an award that falls within a 9:1 ratio as presumptively satisfying constitutional standards regardless of the amount of compensatory damages, *see, e.g., United Am. Ins. Co. v. Merrill*, 978 So. 2d 613, 620 (Miss. 2007) (affirming trial court decision finding $900,000 punitive damage award constitutional "since nine times Ms. Merrill's compensatory damages (after the remittitur) exceeds the punitive damages set by the jury. . . .").

Subjecting defendants to such unpredictability and lack of fair notice, permits the very punitive damages gamesmanship that this Court, by its decisions, wanted to stop. *See Haslip*, 499 U.S. at 18 (expressing concern about punitive damages that "run wild").

B. This Case Provides an Important Opportunity to Clarify What Counts as "Compensatory Damages" to Avoid Manipulation of the Denominator

In addition to judicial confusion over maximum sustainable ratio given such factors as the level of reprehensibility and compensatory damages in a given case, courts compromise the ratio approach if they inflate the compensatory side of the equation. Here, Petitioners raise the important question of whether $12.5 million in prejudgment interest, stemming from a 12% prejudgment interest rate, can be properly considered "compensatory" for purposes of assessing the ratio. Pet. at 13-26. The Court should grant

certiorari in this case to better define the appropriate measure of compensatory damages for purposes of evaluating the ratio. What elements of the judgment are, or are not, included can lead to extraordinarily different results.

For instance, in the present case, the variation spans millions of dollars:

Punitive Damages		
Ratio	Without Prejudgment Interest	With Prejudgment Interest
1:1	$750,708	$13 million
4:1	$3 million	$53 million
9:1	$7 million	$ 119 million

Such a wide range of outcomes undermines the core purpose underlying this Court's due process punitive damages jurisprudence: that defendants have fair notice of the potential consequences of their actions.

The issue is larger than the question of the inclusion of prejudgment interest, which is but one of several ways that plaintiffs attempt to manipulate the ratio to permit an otherwise impermissible award. For instance, Oregon courts have allowed inclusion of prejudgment interest, but rejected attempts to (1) look to the plaintiff's total damages, rather than the amount reduced to reflect a portion that the plaintiff failed to mitigate; or (2) look to the plaintiff's total damages, rather than the amount allocated to the particular defendant. *See Hamlin v.*

Hampton Lumber Mills, Inc., 193 P.3d 46, 53-54 (Or. Ct. App. 2008) (citing cases).

Some courts have determined the ratio by dividing punitive damages by an amount that includes the plaintiff's attorneys' fees and costs. *See, e.g., Willow Inn, Inc. v. Public Serv. Mut. Ins. Co.*, 399 F.3d 224 (3d Cir. 2005) (affirming $150,000 punitive damage award on a $2,000 compensatory damage verdict based on finding a 1:1 ratio after including attorneys' fees of $135,000); *Hollock v. Erie Ins. Exchange*, 842 A.2d 409 (Pa. Super. 2004) (finding $2.8 million punitive damage award just barely exceeded the single digit ratio when including attorneys' fees, costs, and interest). Courts have evaluated the constitutionality of punitive damages based on already trebled damages. *Modern Management Co. v. Wilson*, 997 A.2d 37, 57 (D.C. 2010). In addition, awards for pain and suffering or other emotional harm may reflect a jury's desire to punish a defendant. *See generally* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into Punishment*, 54 S.C. L. Rev. 48 (2002).

As these examples show, inclusion of elements of a judgment that do not reflect the particular defendant's wrongful conduct toward the plaintiff, or that otherwise inflate compensatory damages, may lead courts to justify punitive damages far beyond a level supported by due process. This Court can clarify that the amount reflecting the actual harm to the plaintiff caused by the defendant is the proper basis, and that amounts that are categorized "compensatory" but incorporate a punitive element, should not be included. Granting certiorari in this case will show that this Court meant what it said with respect to ending the punitive damages lottery in the United States. Guidance from the Court would provide greater predictability, consistency, and fairness in civil litigation.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court grant the Petition for Writ of Certiorari in this action.

Respectfully submitted,

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No. 10-349

In The
Supreme Court of the United States

Shell Oil Company, and SWEPI LP (as successor-in-interest to Shell Western E & P, Inc.),
Petitioners,
v.
Nancy Fuller Hebble, et al.,
Respondents.

On Petition for Writ of Certiorari
to the Court of Civil Appeals
for the State of Oklahoma

MOTION OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, Amici Curiae International Association of Defense Counsel ("the IADC") and the National Association of Manufacturers ("the NAM") move for leave to file the accompanying brief as amici curiae in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for the respondents has refused Amici's request for consent.

The IADC is an association of insurance and corporate attorneys whose practice is concentrated on the defense of civil lawsuits. The IADC membership is comprised of the world's leading corporate and insurance lawyers. They are partners in large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives. Members represent the largest corporations around the world, including the majority of companies listed in the FORTUNE 500. Since 1920, the IADC has been dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable only for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. The IADC's activities benefit the approximately 2,500 invitation-only, peer-reviewed members and their clients as well as the civil justice system and the legal profession. The IADC regularly files briefs

in pending cases throughout the United States on civil justice issues of broad application.

The National Association of Manufacturers ("the NAM") represents the interests of manufacturers in court. The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial section and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM monitors legal trends and developments affecting the ability of manufacturers to be treated fairly by the legal system. The NAM is actively involved in tracking major lawsuits impacting manufacturers and in related activities to promote a fair and balanced legal system for resolving disputes. With manufacturers facing legal costs of some $865 billion annually, the efforts of the NAM have a direct effect on the competitive position of American manufacturers and complement the NAM's legal reform policy endeavors.

Amici curiae are particularly interested in this case because it demonstrates how the Court's punitive damage jurisprudence is unable to provide civil defendants with fair notice of the magnitude of their exposure to punitive damages and how the resulting unpredictability in evaluating punitive exposure produces practical problems for all parties and their counsel in settlement evaluation. This case thus presents this Court with an opportunity clarify

that punitive damage awards must bear a reasonable relationship to the damages compensating the plaintiff for the actual harm suffered—and that other types of "additional damages" should not be permitted to skew the ratio between actual damages and punitive damages.

The IADC and the NAM's motion for leave to file the accompanying brief as amici curiae should be granted.

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INTEREST OF THE AMICI CURIAE[1]

The interest of the amici curiae is described in the accompanying motion for leave to file this brief.

BACKGROUND AND INTRODUCTION

The two issues presented in Shell's petition raise a fundamental question in desperate need of this Court's guidance—*To what types of actual damages must a punitive damage award reasonably relate?* Because courts in different states categorize different types of damages as "compensatory" for comparison to the punitive damage award, this Court's ratio analysis is untethered to any predictable guidepost. As applied by various lower courts, this Court's ratio guideline essentially involves two open variables—if the types of additional damages that may be considered "compensatory" are changeable and uncertain, then so too is the range of constitutionally permitted punitive damages.[2]

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[1] Pursuant to this Court's Rule 37.6, amici curiae the IADC and the NAM certify that no counsel for a party to this case authored any part of this brief, nor did any party, or counsel to any party, make any monetary contribution to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.2(a), amici curiae file this brief on September 29, 2010, ten days before its due date of October 13, 2010.

[2] Shell's petition also presents an opportunity for the Court to clarify its jurisprudence on what has become another source of unpredictability in punitive damage awards: the maximum constitutionally permissible ratio when compensatory damages are "substantial." The state and federal courts' inconsistent application of this Court's statement that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," has left businesses like those represented by amici curiae rudderless in evaluating punitive

This case exemplifies the necessity for a predictable starting point in actual damages for calculating the punitive damage ratio. Often, the denominator of the punitive damage ratio depends more on the particular state in which the issue happens to arise and less on the character of the award or the extent of the injury to the plaintiff. Here, because the injury occurred in Oklahoma, the Oklahoma court included a special 12% compounded pre-judgment interest in the denominator and thereby determined that a $53 million punitive damage award was reasonably related to an underpayment of $750,000 in oil and gas contractual net profit payments. Such creative manipulation of the punitive damage ratio is common and recurring.

Amici cannot overstress the importance of having a consistent rule. This case provides this Court with the opportunity to provide a rule that would:

- Provide consistent constitutional protections for defendants across the country,
- Incentivize settlement by equipping plaintiffs and defendants with consistent case valuation parameters,
- Conserve judicial resources by eliminating the case-by-case categorization of continually changing statutory damage schemes, and
- Preserve legislative flexibility to craft remedies.

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damage exposure. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003). Although this brief does not focus on the havoc caused by the lower courts' inconsistent rulings on this issue, the same kind of damaging unpredictability described in this brief accompanies both issues raised in Shell's petition, and both are of real and ongoing concern to amici curiae.

By granting certiorari, the Court can answer the broad question of what effect—if any—damages that have both compensatory and punitive qualities should have on the constitutional ratio between the actual harm suffered by the plaintiff and punitive damages awarded based on the reprehensibility of a defendant's conduct.

ARGUMENT

I. Amici agree with Shell that the absence of clear guidance on how to calculate the punitive damage ratio frustrates due process.

Amici agree with Shell that the lack of clear guidance on how to calculate the punitive damage ratio requires clarification from this Court. Although the Court has weighed in on the constitutionality of various punitive damage ratios, the Court has not squarely confronted the issue here. The issue here illustrates that the calculation of the ratio itself, by including additional variable damage components, threatens the due process rights of defendants.

A. The current jurisprudence regarding how the punitive damage ratio is calculated frustrates due process because it leads to unpredictable punitive damage awards.

This case illustrates the unpredictability of punitive damage awards in the absence of clear guidance on how the punitive damage ratio should be calculated. The plaintiffs suffered actual harm of approximately $750,000 from the underpayment of oil and gas contractual net profit payments. Based on this Court's guidance on the permissible punitive damage ratio in *Exxon* and *State Farm*, Shell would have been on notice that it could likely face exposure

to punitive damages in a 1:1 ratio, or $750,000. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 (2008); *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003). Some courts, also relying on *State Farm*, have issued decisions suggesting possible notice that punitive damages could reach a 4:1 ratio, or $3 million. *See State Farm*, 538 U.S. at 425. Shell had no notice, however, that an award of $53 million in punitive damages would be upheld as constitutional. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

The Oklahoma court's justification for upholding that $53 million punitive damage award illustrates the jurisprudential gap. The Oklahoma court relied on a special interest rate—12% compound pre-judgment interest—to increase the amount of "compensatory" damages even though the Oklahoma legislature candidly described it as a "penalty" in previous iterations of the statute. The dramatic increase in the amount of purported "compensatory" damages moved the ratio to punitive damages from a clearly unconstitutional 70:1 to 4:1. Thus, the ad hoc modification of the punitive damage calculation dramatically altered Shell's punitive damage exposure without regard to procedural due process concerns regarding adequate notice.

If the Oklahoma court's ad hoc modification of the punitive damage ratio was an outlier, this case would not warrant special attention. Unfortunately, the lack of guidance from this Court on how to determine whether additional recoveries beyond the actual harm inflicted should be included as part of the "harm to the plaintiff" has produced conflicts in a variety of contexts, for example:

- Emotional distress with a partially punitive aspect. *Compare Roby v. McKesson Corp.*, 101 Cal. Rptr. 773, 797-99 (Cal. Ct. App. 2010); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 308-10 (Tex. 2006); *Daka, Inc. v. McCrae*, 839 A.2d 682, 697-701 (D.C. Ct. App. 2003); *with Boyd v. Goffoli*, 608 S.E.2d 169, 182-84 (W. Va. 2004).
- Lost profits. *Compare Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 489 (6th Cir. 2007), *with Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335 (Fed. Cir. 2001).
- Attorneys' fees. *Compare Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 235 (3d Cir. 2005); *Jurinko v. Med. Protective Co.*, 305 F. App'x 13, 28 n.16 (3d Cir. 2008), *with Wallace v. DTG Operations, Inc.*, 563 F.3d 357 (8th Cir. 2009). The inconsistent use of attorneys' fees to dilute the punitive damage ratio is currently before this Court in *Stroud v. Blount*, No. 09-1572, on petition for writ of certiorari from *Blount v. Stroud*, 914 N.E.2d 925 (Ill. App. Ct. 2009).
- Capped or reduced awards. *Compare Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428, 447-48 (Kan. 2006); *USA Truck, Inc. v. West*, 189 S.W.3d 904, 906, 911 (Tex. Ct. App. 2006), *with Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 54 (Ky. 2003). *See also Clark v. Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006) (splintering on how to calculate the ratio); *Groth v. Hyundai Precision & Indus. Co.*, 149 P.3d 333, 340-41 (Or. Ct. App. 2006) (discussing complexity of computing ratio when award was limited by statute).

Clear guidance from the Court on how the punitive damage ratio should properly be calculated would provide defendants with the constitutionally required notice and greatly enhance the ability to accurately predict the maximum size of a punitive damage award.

B. The absence of clear guidance from this Court invites state legislatures and courts to skew the ratio.

Absent clear guidance from this Court, state legislatures and state courts are able to perform ad hoc calculations of the ratio that dramatically alter defendants' potential punitive damage liability. As the law now stands, a state legislature's characterization of a monetary award as compensation or as a penalty—whether the impact on the punitive damage ratio is intentional or not—can dramatically change a defendant's punitive damage exposure from state-to-state and from year-to-year. Here, the Oklahoma legislature's 1985 deletion of the descriptive term "penalty" from the interest statute was all that the Oklahoma court needed to dramatically alter the result of this case, even though:

1) The legislature did not substantively change the pre-judgment interest calculation from the pre-1985 punitive statute.
2) The pre-judgment interest does not bear any relation to the actual harm suffered by the defendant, even when the time value of money is taken into account. In terms of 2010 dollars, the 1973 underpayments would still only be $3.3 million.
3) The statute singled out a particular class of disfavored oil and gas defendants for

especially high pre-judgment interest. Rather than 12% compound interest, other defendants are only subject to 6% simple interest.

The ability of state legislatures and courts to skew the punitive damage ratio and sidestep this Court's punitive damage jurisprudence is demonstrated by the fact that when faced with the same situation—deletion of the word "penalty" from an oil and gas payment statute—the Alabama Supreme Court reached the opposite conclusion. *See Ala. Dep't of Conservation & Natural Res. v. Exxon Mobil Corp.*, 11 So. 3d 194, 200-01 (Ala. 2008). Leaving the issue to state law makes the federal Constitution not merely disuniform but also infinitely manipulable.

Unfortunately, the creative minds of attorneys, and the state legislatures and courts in which they ply their trade, will never run dry trying to find such ways to manipulate this Court's punitive damage ratio. Currently on writ of certiorari to this Court are examples of that creativity—*Stroud v. Blount*, No. 09-1572, where the Illinois court used attorneys' fees to push the punitive damage ratio from 10:1 down to 2:1, and *Lawnwood Medical Center, Inc. v. Sadow*, No. 10-371,where the Florida court permitted an infinite ratio of $5 million in punitive damages to zero compensatory damages. *See Blount*, 914 N.E.2d at 943; *Lawnwood Med. Ctr., Inc. v. Sadow*, ___ So.3d ___, No. 4D08-1968, 2010 WL 1066833, at *13 (Fla. Ct. App. Mar. 24, 2010) . The financial stakes are too high, the pot of gold at the end of the punitive damage lottery too big, for the creative juices not to flow toward finding new ways to characterize legislatively and judicially created additional damages as "compensatory" damages to

dilute the punitive damage ratio. Without clear guidance from this Court, state-by-state determinations will continue to threaten the due process notice rights of companies represented by Amici.

C. The absence of clear guidance on how to consistently calculate the punitive damage ratio leads to a result that violates procedural due process.

Amici do not suggest that *all* remedies should be consistent across all states—doing so would intrude upon the state's rights. Amici merely suggest that this Court provide guidance on how the punitive damage ratio governed by the Fourteenth Amendment should be calculated. U.S. CONST. amend. XIV, § 1.

Inconsistency in calculations defeats the purpose of the punitive damage ratio—providing notice and predictability for what constitutes a constitutionally impermissible punitive damage award. Amici acknowledge the difficulty of crafting a ratio that can apply to every situation—whether 4:1, 1:1, or some form of sliding scale based on the nature of the harm or conduct. However, flexibility regarding the ratio cannot be compounded by vagueness regarding the definition of compensatory damages. Providing guidelines in the form of a numeric ratio, without any guidance on how to calculate that ratio in practical application, is no guidance at all. Given the inclusion of the clearly penal pre-judgment interest in the compensatory side of the punitive damage ratio, this case provides the perfect opportunity for the Court to provide additional guidance.

II. The absence of clear guidance on how to consistently calculate the punitive damage ratio and the resulting absence of procedural due process notice is of particular concern to Amici.

The Court has long recognized that excessive punitive damages bearing no reasonable relationship to the actual harm suffered threaten constitutional protections. Amici, its members, and clients of its members must rely on these protections. Therefore, Amici focus on the procedural due process problem inherent with the current jurisprudence—unpredictability. In the absence of clear guidance on the calculation of the punitive damage ratio, clients and their counsel, such as Amici, cannot accurately assess the true magnitude of a defendant's punitive damage exposure.

Unpredictability also hinders settlement. The absence of clear guidance on the method of calculating the punitive damage ratio prevents plaintiffs and their counsel from accurately (and reasonably) assessing possible verdict value. Thus, the absence of this clear guidance prevents plaintiffs and defendants from collectively assessing settlement value and frustrates the agreed resolution of disputes. This uncertainty is compounded by the possible exposure for uninsured punitive damages coercing settlements with plaintiffs and defendants' own insurers.

A. The absence of clear guidance on how to calculate the punitive damage ratio frustrates the ability of counsel and the clients they advise to make informed settlement recommendations and decisions.

In the absence of a state statutory cap on punitive damage awards, the ratio guidance provided by this Court is the only vehicle available to attorneys and clients for predicting the eventual amount of a potential punitive damage award. For example, a defendant would expect that if it is facing actual harm exposure of $1 million, the Constitution and this Court's jurisprudence would suggest that the punitive damage exposure would also be $1 million, a 1:1 ratio.

However, absent further clarification from this Court, the defendant cannot accurately estimate the effect of statutory and common-law "add-ons." The possibility that state legislatures or state courts might arbitrarily define add-ons as "compensatory damages" leads to unpredictable dilution of the punitive damage ratio. Who could have predicted that an underpayment of $750,000 in oil and gas contractual net profit payments would produce a purportedly constitutional $53 million punitive damage award?

For a defense attorney, evaluating a defendant's punitive damage exposure is a key part of evaluating the potential verdict and settlement ranges confronting the client. For our system of justice to work in practice, the client's decision regarding whether to try or settle a case must be based on a more predictable accounting for maximum

punitive damage exposure than is currently permitted.

For a plaintiff's attorney, the absence of clear guidance in calculating the ratio turns punitive damage claims into a lottery where the rewards are uncertain but possibly immense. The uncertainty encourages gaming the system by forum-shopping in an attempt to avoid states that faithfully adhere to the Constitution. Absent clear guidance, that behavior will only continue.

B. The absence of clear guidance on how to calculate the punitive damage ratio is especially troublesome because the insurability of punitive damages is constantly questioned by insurers.

The unpredictability in evaluating the maximum range of punitive damages exposure takes on even greater importance because insurers usually take the position that punitive damages potentially are not covered by their insurance policy. The prospect of a massive amount of potentially uninsured punitive damages creates a financial nightmare for any business. How many businesses could survive a $53 million uninsured punitive damage award as a result of losing a lawsuit worth $750,000 in actual damages?

This is not a Chicken Little scenario. In practice:

- Insurers routinely reserve their rights to later deny coverage in a case presenting the potential for an award of punitive damages.
- Insurers who have previously negotiated an express exclusion of coverage for punitive damages in their policy will deny coverage outright.

- Even when their insurance policies do not expressly exclude coverage for punitive damages, insurers frequently invoke their insurance policies' exclusions for intentional acts in order to reserve their right to ultimately deny insurance coverage for punitive damages.

Faced with providing coverage for a substantial punitive damage award, insurers predictably try to shift the risk of the punitive damages onto the insured. Some form of this scenario plays out in almost all cases involving punitive damages and compounds the many practical problems that Amici face because of the current uncertainty inherent in calculating the punitive damage ratio.

III. Shell's petition provides this Court with the opportunity to clarify that the relevant ratio is the relationship between only the amount of punitive damages and the amount of actual damages.

Shell's petition exemplifies the need for guidance that provides clear notice of the proper method of calculating the punitive damage ratio. For example, Amici believe that it would be possible (and appropriate) to articulate a bright line rule that establishes which types of damages should be included in which side of the ratio. Consistent with this Court's punitive damages jurisprudence, the damages that represent the actual or potential "harm inflicted" on the plaintiff should be compared to the punitive damage award. *See Gore*, 517 U.S. at 575. Amici would suggest that other types of damages, whether created by state statute or by state common law, should be excluded from calculation of the ratio. Adopting this rule would provide invaluable

clarification on how the components of the ratio should be calculated, resolve current confusion and disagreement among the lower courts, and substantially advance the Court's punitive damages jurisprudence.

A. This Court's punitive damage jurisprudence has long and correctly focused on the relationship between the damages awarded to compensate a plaintiff for the "actual harm inflicted" relative to the punitive damage award.

"The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree." *Gore*, 517 U.S at 581. However, for purposes of evaluating this relationship, the Court has recognized that it is not the label used to describe the damages designed to compensate a plaintiff for the actual harm suffered that matters, but rather the substance of those damages. *See Gore*, 517 U.S. at 581 n.32 (citing *Grant v. McDonogh*, 7 La. Ann. 447, 448 (1852) ("[E]xemplary damages allowed should bear some proportion to the *real damage sustained*") (emphasis added); *Saunders v. Mullen*, 66 Iowa 728, 729, 24 N.W. 529 (1885) ("When the *actual damages* are so small, the amount allowed as exemplary damages should not be so large") (emphasis added); *Flannery v. Baltimore & Ohio R.R. Co.*, 15 D.C. 111, 125 (1885) (when punitive damage award "is out of all proportion to the *injuries received*, we feel it our duty to interfere") (emphasis added); *Houston & McCarthy v. Niskern*, 22 Minn. 90, 91-92 (1875) (punitive damages "enormously in excess of what may justly be regarded as *compensation" for the*

injury must be set aside "to prevent injustice") (emphasis added)).

In distinguishing the purposes served by compensatory and punitive damages, the Court has characterized compensatory damages as "'intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'" *State Farm*, 538 U.S. at 416 (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)). This is in contrast to punitive damages, which are "aimed at deterrence and retribution." *State Farm*, 538 U.S. at 416. Although the Court has at times used different terminology to describe what type of damages should be compared to a punitive damage award for constitutional purposes, the Court's meaning—in part demonstrated by its interchangeable use of the terms "actual damages" and "compensatory damages"—has remained focused on the harm inflicted on or suffered by the plaintiff.

B. The lower courts' inconsistent inclusion of additional types of compensatory damages as part of the punitive damage ratio reveals that those types of damages differ from the "actual harm inflicted" on the plaintiff.

The types of compensatory damages that the lower courts sometimes include in their calculation of the punitive damage ratio run the gamut. Courts across the nation vary widely in their treatment of "add-on" damages like pre-judgment interest, special interest, post-judgment interest, attorney's fees, costs, and penalty interest for purposes of calculating the punitive damage ratio. This is not surprising, given that the schemes of different states depend on

the imponderable vagaries and development of the law by state supreme courts as well as by state legislatures. Nevertheless, the differences in those state schemes should not become an unconstitutional obstacle to what should be a uniform calculation for deciding whether a punitive damage award complies with constitutional requirements. The differences in those schemes should instead become the impetus to adopting a uniform calculation of that ratio that provides the notice needed for defendants to evaluate their maximum potential punitive exposure and then to modify their conduct accordingly.

C. A ratio comparing punitive damages only to damages that compensate a plaintiff for the "actual harm inflicted" would provide much-needed guidance to the lower courts and is consistent with this Court's jurisprudence.

Amici suggest that this Court clarify that the ratio should compare only the harm suffered by plaintiff against the punitive damage award. This rule would provide both the clear direction needed by the lower courts and the adequate notice to defendants required under procedural due process. Further, the rule flows directly from this Court's original formulation of the ratio. Instead of determining what additional types of damages should be included in the ratio on a case-by-case basis or state-by-state basis, the Court can resolve the question with a simple calculation that is consistent with the Court's historic description of the relevant inquiry.

By limiting the punitive damage ratio to the harm suffered by the plaintiff, and stripping away the varying and continually changing legislative

enhancements to "compensatory damages," this Court would adopt a more easily administered rule. That rule would allow parties, counsel, and the lower courts real predictability in applying this Court's jurisprudence under the punitive damage ratio guidepost. It would eliminate the problem presented by this case and so many others encountered by Amici across the country where different state courts interpret the add-on as compensatory damages in order to dilute the ratio. It would make unnecessary this Court adjudicating, on a case-by-case basis, all of the state legislative intent issues and state supreme court rulings that might justify the classification of a particular type of "compensatory" damage as "actual damages" under this Court's punitive damage ratio.

Although this Court has "'consistently rejected the notion that . . . a simple mathematical formula'" can determine a bright line between a constitutional punitive damage award and an unconstitutional one, the Court's jurisprudence does not preclude the creation of a bright line to determine what types of damages should be considered when evaluating whether the measure of punishment is "reasonable and proportionate" to the harm suffered by the plaintiff. *State Farm*, 538 U.S. at 424-25, 426 (quoting *Gore*, 517 U.S. at 582). Adopting a bright-line rule here would provide a predictable foundation for evaluating punitive damage award, and therefore make meaningful the flexibility built into the Court's punitive damage jurisprudence.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the petition for a writ of certiorari should be granted.

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IN THE

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SHELL OIL COMPANY, and SWEPI LP
(As Successor-in-Interest to SHELL
WESTERN E & P, INC.),
Petitioners,

v.

NANCY FULLER HEBBLE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the State of Oklahoma

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

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SHELL OIL COMPANY, and SWEPI LP
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Petitioners,

v.

NANCY FULLER HEBBLE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the State of Oklahoma

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE* [1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 100 corporate members representing a broad cross-section of American and international product manufacturers.

[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party has authored this brief in whole or in part, and no person or entity other than *amicus*, its members and their counsel has made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), all parties received timely notice and have consented to the filing of this brief.

These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 900 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

PLAC is particularly interested in the issues raised by this case, because product manufacturers are disproportionately affected by punitive damages awards. The due process protections afforded by the United States Constitution are essential to ensure that punitive damages awards are rendered in a manner that is scrupulously fair to the defendant. State and federal courts have interpreted the punitive damages guideposts set out by this Court in a wildly inconsistent fashion. Whether this is the result of confusion or a willful attempt to circumvent the Court's dictates, product manufacturers and others are routinely subject to arbitrary and grossly excessive punitive damages awards. PLAC believes its viewpoint will assist in the Court in achieving a better understanding of the nature of the problem and the reasons why it is critical for the Court to provide additional clarification regarding the relationship among the guideposts and the proper appli-

cation of the ratios between compensatory and punitive damages.

SUMMARY OF ARGUMENT

In the more than seven years since this Court decided *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the punitive damages guideposts and the ratios between compensatory and punitive damages set out by the Court have proven to be of little use in ensuring a system of justice in which defendants can be reasonably apprised of the penalties they may face. The relationship among the guideposts is unclear, allowing courts to use the reprehensibility guidepost to trump the others. Courts are also confused about application of the ratios, and have defaulted to the position that a 9:1 or lower ratio will always pass muster, despite this Court's holding that in cases with substantial compensatory damages, a ratio of 1:1, and in almost all other cases, a ratio of 4:1, approaches the outer limits of due process.

Since *State Farm*, courts have applied ratios from 1:1 to 2172:1, and all levels in between. In some courts, the perceived reprehensibility of the conduct is used to justify extremely high ratios. In others, the "potential harm"—often loosely defined—is substituted for the jury's actual damages award, so as to transform a very large ratio into a much smaller one. Courts routinely exceed a 1:1 ratio between compensatory and punitive damages, although the compensatory award is unquestionably substantial. Even more troubling is the fact that courts in different Circuits have interpreted *State Farm* in different ways. In short, the outer limits of due process differ greatly depending on the fortuity of where and in what court a case happens to be decided. This is

inconsistent with our constitutional guarantees, which should be applied similarly regardless of what court is meting out justice.

Even when ratios are applied in a manner generally consistent with *State Farm*'s ruling, courts have applied different approaches to determining the components of "compensatory" damages. In this case, the court included pre-judgment interest at a punitive rate, while other courts have included various other components, including attorneys' fees and lost profits. A ratio whose numerator and denominator cannot be readily and consistently determined is of little use to courts attempting to ensure that punitive damage awards comport with due process, or to defendants assessing potential liability should they go to trial. The problem of inconsistent application of the *State Farm* ratios, while significant in itself, is magnified when the ratio itself is malleable depending on what a court includes as compensatory.

These problems are perhaps more keenly felt by product manufacturers than by other litigants, because of the fact that product liability cases more often involve physical injuries or deaths. Aside from the obvious emotional component of these cases, which can result in higher jury verdicts, they often lead to punitive damages awards. The inability of manufacturers and sellers to assess their level of risk results in forced settlements, higher prices, less innovation and a marketplace where some products are simply not economical to design and sell because of the risk of unfettered and unpredictable liability.

The Court should grant *certiorari* in this case to clarify the application of the ratios set forth in *State Farm* and the relationship among the guideposts, and to make clear that compensatory damages do not

include pre-judgment interest and other "add-ons", so that due process guarantees are applied similarly regardless of the court or jurisdiction in which a defendant may find itself.

ARGUMENT

Despite this Court's efforts to lend consistency to the process by which punitive damages are awarded and reviewed, defendants in state and federal courts continue to experience wide variations in how the guideposts and ratios are applied. The "stark unpredictability"[2] of punitive awards violates due process because defendants are deprived of "fair notice . . . of the severity of the penalty that a State may impose." *BMW N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). The decision of the Oklahoma Court of Civil Appeals is only one of many state and federal cases in which the guideposts have been twisted beyond recognition. Review is necessary in order to clarify the relationship among the guideposts and the proper application of the ratios between compensatory and punitive damages.

I. IN THE WAKE OF *STATE FARM*, PUNITIVE DAMAGES AWARDS CONTINUE TO BE UNPREDICTABLE AND ARBITRARY IN VIOLATION OF DUE PROCESS

In *State Farm*, this Court elaborated on the guideposts set forth in *Gore* in an effort to prevent arbitrary and constitutionally excessive punitive damages awards. While declining to provide "rigid benchmarks", 538 U.S. at 425, the Court made clear that all three guideposts should be considered, and gave guidance as to the ratios to be used in evaluat-

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[2] *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008).

ing punitive damages awards. Specifically, the Court explained that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.* The Court further held that, "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* The $1 million awarded to the plaintiffs in *State Farm* was recognized to be "substantial", and, accordingly, the Court held that it "likely would justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429.

Despite the *Gore* and *State Farm* framework, courts continue to reach results that are flatly inconsistent with it and wildly divergent. Ratios from 1:1 all the way to 2174:1 have been approved as purportedly consistent with due process constraints. *See, e.g., Williams v. Conagra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004) (1:1 ratio applied in Title VII employment discrimination case); *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354 (11th Cir. 2004) (2174:1 ratio in RICO case involving gambling charges included in long distance bills). Despite *State Farm*'s direction that "few awards exceeding a single-digit ratio . . . will satisfy due process," 538 U.S. at 425, numerous courts have found reasons to exceed single digits, often by a large margin. *See, e.g., Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003) (37:1 ratio in bedbug infestation case); *Krysa v. Payne*, 176 S.W.3d 150 (Mo. App. 2005) (27:1 ratio in fraud case involving vehicle sale); *Bronakowski v. Lindhurst*, __S.W.3d__, 2009 Ark. App. 513 (2009)

(42:1 ratio in case involving trees cleared from plaintiffs' property without permission resulting in economic harm of $592.85).

Courts seem most inclined to permit hugely lopsided ratios when the amount of compensatory damages is small, using as justification such factors as perceived reprehensibility or potential damages. Indeed, although it is to some extent a subjective indicator, a high degree of reprehensibility is routinely cited in support of grossly excessive punitive damages awards. In such cases, the reprehensibility guidepost effectively becomes the *only* guidepost. Other courts have applied ratios exceeding 1:1 even where compensatory damages are unquestionably substantial. *See, e.g., Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004) (in case involving denial of disability benefits where compensatory damages were over $1.9 million, court approved punitive damages of $5 million, a ratio of 2.6:1); *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521 (Tenn. 2008) (ratio of 5.35:1 approved in automobile defect case involving death of child where compensatory damages were $2.5 million).

If this Court had "concerns over the imprecise manner in which punitive damages systems are administered"[3] when *State Farm* was decided in 2003, the way in which its holdings have been applied by lower courts since that time should give rise to nothing short of extreme consternation, if not outright alarm.

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[3] *State Farm*, 538 U.S. at 417.

A. In Small Compensatory Damages Cases, Reprehensibility is Used as the Rationale for Grossly Excessive Punitive Damages

Many of the highest ratios are applied in cases where compensatory damages are small. Courts in this situation seem to struggle with how to justify large punitive damages awards, often citing the reprehensibility of the conduct. This scenario was contemplated in *State Farm*, 538 U.S. at 425 ("ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages'") (quoting *Gore*, 517 U.S. at 582). But permitting unfettered discretion in such circumstances to use any ratio imaginable belies the notion that there are *any* "outermost limits" to the due process guarantee. Moreover, permitting the reprehensibility guidepost to trump the ratio guidepost means that, for many courts, the analysis is over once reprehensibility is determined. In this way, a subjective determination of reprehensibility is used to obliterate due process guarantees.

A case in point is *Trinity Evangelical Lutheran Church and School-Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789 (Wis. 2003). The *Trinity* case arose out of an insurance policy that erroneously omitted certain coverage due to the agent's mistake in writing the application. The error was discovered after an accident resulted in litigation against the insured church, but the insurer declined to reform the policy. The trial judge granted summary judgment to the policyholder on the bad faith claim, awarding $17,500 in compensatory damages, and a jury returned a punitive damages award of $3.5 million—

a ratio of more than 200:1. Notwithstanding this ratio, the court affirmed the award, citing the insurance company's reprehensible conduct, including its status as a "recidivist" because it was the defendant in a case *more than 30 years earlier* in which the court held that an insurer has a duty to reform an insurance policy upon discovery of a mutual mistake. *Id.* at 801. The court never even mentioned the 200:1 ratio between actual and punitive damages, but, instead, recast the ratio as 7:1 on the basis of plaintiff's evidence that its potential exposure in the underlying litigation was $490,000. *Id.* at 803[4]

As a dissenting judge noted, the comparison between the facts of *Trinity* and the *State Farm* case is striking, yet in *State Farm*, this Court compared the actual compensatory damages in the bad faith claim (not the potential verdict in the underlying action) with the punitive damages award and found the ratio of 145:1 unconstitutional. *Id.* at 811 (Sykes, J., dissenting). The judge continued, "The majority's position [using the $490,000 potential award as the denominator] . . . amounts to nothing more than a manipulation of the ratio for purposes of due process scrutiny." *Id.* The dissent also exposed the absurdity of the majority's reprehensibility analysis, noting that: this was a case that arose from a mistake; it involved economic injury only; Trinity was never at risk in the underlying action; no one's health or safety was at risk; there was no financial vulnerability; and the 30-

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[4] A dissenting judge made clear that Trinity would never have been exposed to liability in the auto accident case, because even if Tower did not provide coverage under its policy, the insurance agent's errors and omission policy would provide coverage. *Id.* at 810-11 (Sykes, J., dissenting).

year old contract case in no way supported a "recidivist" label. *Id.* at 810.

Similarly, Shell's conduct in this case resulted in only economic injuries, posed no risk to anyone's health or safety, did not involve repeated similar instances, and was not directed at a financially vulnerable plaintiff. Yet the court found Shell's conduct to be so reprehensible as to support a ratio as high as 87:1, depending on how "compensatory" damages are counted.[5] Thus, even though the Court has laid out the elements of reprehensibility with relative clarity, the interpretation is subjective and leads to dissimilar outcomes for similar conduct. *Compare Krysa v. Payne*, 176 S.W.3d 150 (Mo. App. 2005) (27:1 ratio in case involving fraud and breach of warranty where vehicle was sold without disclosure that it was actually two damaged vehicles welded together) *with Austin v. Stokes-Craven Holding Corp.*, 691 S.E.2d 135 (S.C. 2010) (8:1 ratio in fraud case involving sale of automobile without disclosure of prior accident).

Other courts have allowed perceived reprehensibility to run roughshod over the other guideposts. *See, e.g., Kemp*, 393 F.3d at 1363 (affirming 2174:1 ratio in case where defendant's inclusion of charges for telephone gambling game in long-distance charges was characterized as "large-scale corporate malfeasance"). In cases where there is a confluence of bad conduct, an unsympathetic (or simply large corporate) defendant and an innocent victim, disproportionate punitive damages awards are allowed to stand

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[5] When the same case can be characterized as involving multiple ratios depending on what is counted as "compensatory", it is apparent that the *State Farm* ratios are toothless as a means to combat grossly excessive punitive damages awards.

because "a particularly egregious act has resulted in only a small amount of economic damages." *Gore*, 517 U.S. at 582. As one of the dissenters in *Trinity* observed, "The plaintiff was a church, the defendant was an insurance company, and the judge was making official pronouncements about the defendant's bad faith. Is there any wonder that the jury awarded $3,500,000 in punitive damages?" 661 N.W.2d. at 806 (Prosser, J., dissenting). *See also Mathias*, 347 F.3d at 677 ($5000 compensatory damages and $186,000 in punitive damages, a 37:1 ratio, affirmed in bedbug case where the defendant's conduct was judged "outrageous"); *Superior Fed. Bank v. Jones & Mackey Const. Co., LLC*, 219 S.W.3d 643 (Ark. Ct. App. 2005) (17.6 to 1 ratio is not constitutionally excessive or "breathtaking" due to substantial degree of reprehensibility).[6]

As the Texas Supreme Court stated in reversing an award of $1.25 million in punitive damages in a case involving actual damages of $5327.11 as a result of the conversion of 13 head of cattle:

> If courts fail to diligently police the "particularly egregious" exception, they insulate from due-process review precisely those cases where judicial review matters most: those involving unsympathetic defendants where juries are most likely to grant arbitrary and excessive awards. *Allowing a freewheeling reprehensibility exception would subvert the constraining power of the ratio guidepost.*

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[6] The court stated, "Our research indicates that this factor [the ratio] seems to engender great confusion and controversy in comparison with the other factors. We believe this is due in no small part to the U.S. Supreme Court's rather conflicting statements on the matter." *Superior Fed.*, 219 S.W.3d at 651.

Bennett v. Reynolds, 315 S.W.3d 867, 879 (Tex. 2010) (emphasis added; footnote omitted). Yet this is exactly what is happening in courts across the country.

B. The Use of Potential Harm in Place of Actual Damages Encourages Speculation and Subverts the Role of the Jury

Courts have also permitted ratios greatly in excess of 4:1, or even single digits, in cases where the potential harm, rather than actual harm, is judged to be the appropriate denominator. In *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), a plurality of the Court said, "It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 460. The plurality affirmed a $10 million punitive damages award with a ratio of 526:1, citing potential harm and reprehensibility of the conduct. Writing separately, Justice O'Connor took issue with the plurality's approach, stating, "I believe it likely, if not inescapable, that the jury was influenced unduly by TXO's out-of-state status and its large resources." *Id.* at 495.[7]

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[7] Justice O'Connor was also critical of the state appellate court's application of "cavalier standards in the course of a cursory examination of the case." *Id.* at 496. The same could be said of the Oklahoma Court of Civil Appeals in this case, whose two-paragraph treatment of the punitive damages award is unquestionably "cursory" and arguably "cavalier".

The outcome in *TXO* would seem to be in question in light of the Court's more recent punitive damages jurisprudence. But the use of often speculative assessments of "potential harm" in order to justify ratios that are in evident conflict with the guideposts continues to be a problem. For example, in *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940 (Or. Ct. App. 2007), which involved a predatory lending claim, the appellate court reinstated the jury's original $500,000 punitive damages award, recharacterizing what had been a 7.5:1 ratio as a 1.53:1 ratio. In lieu of the actual compensatory award of just under $32,000, the appellate court estimated the potential harm of the defendant's conduct as the interest that would have been paid over the life of the loan, which came to over $326,000. *Id.* at 958; *see also Trinity*, 661 N.W.2d at 803 (200:1 ratio converted to 7:1 by insertion of $490,000 in potential harm in place of actual $17,500 compensatory award).

Not only are assessments of potential harm often speculative, but use of potential harm, rather than actual damages, subverts the role of the jury. "The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values." *TXO*, 509 U.S. at 473 (O'Connor, J.). The willingness of some courts to ignore the compensatory damages *as found by the jury* constitutes patent manipulation in order to justify the punitive damages award. *See Trinity*, 661 N.W.2d at 811 (Sykes, J., dissenting). Ironically, the inviolability of the jury's determination of the appropriate amount of punitive damages necessary to punish and achieve retribution is cited by the very courts that so eagerly push aside the jury's compensatory damages decision. While there may be a rare case in which consideration of

potential harm is justified, in most cases deference should be given to the jury's decision on compensatory damages.[8]

C. Courts Improperly Exceed the 1:1 Ratio Even When Compensatory Damages Are Substantial

Many state and federal courts have departed considerably from a 1:1 ratio even in cases where compensatory damages are substantial. Perhaps the most egregious example is the decision of the Utah Supreme Court on remand in *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004), where the court reduced the punitive damages award to a ratio of 9:1, despite the fact that the compensatory award of over $1 million was unquestionably substantial.[9] Notwithstanding this Court's instruction that, in such cases, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *State Farm*, 538 U.S. at 425, the Utah court considered the 9:1 ratio justified in light of State Farm's highly reprehensible conduct.

Similar results have obtained in other cases. *See, e.g., Seltzer v. Morton*, 154 P.3d 561 (Mont. 2007) (9:1 ratio affirmed in case involving $1.4 million in compensatory damages for malicious prosecution and abuse of process arising out of art authenticator's opinion); *Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001 (8th Cir. 2008) (8.36:1

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[8] The exception would be a case such as this one where the jury was directed to include pre-judgment interest in its "compensatory" award.

[9] The definition of "substantial" is, of course, subject to interpretation, lending additional uncertainty to the proper application of the ratio.

ratio in commercial fraud case with $125,000 in compensatory damages); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003) (7.2:1 ratio applied in employment discrimination and retaliatory discharge case in which $360,000 in compensatory damages were awarded); *Flax*, 272 S.W.3d 521 (5.35:1 ratio in automobile products liability case where jury awarded $2.5 million for death of child).

What these courts have in common is a willingness to read *State Farm* to permit a high single-digit ratio, regardless of whether the compensatory damages are "substantial" or even whether the conduct at issue is objectively reprehensible. *See, e.g., Gober v. Ralphs Grocery Co.*, 137 Cal.App.4th 204, 222-23 (2006) (6:1 ratio approved despite "modest degree of reprehensibility" and substantial compensatory damages). In the process, courts disregard completely this Court's ruling in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), that a four-to-one ratio "may be close to the line" of constitutional impropriety. *See also Gore*, 517 U.S. at 581; *State Farm*, 538 U.S. at 425.

While the Court in *State Farm* evidently wanted to leave room for a very small number of cases in which individual factors might make a larger ratio permissible, appellate courts around the country have driven a proverbial truck through this opening. If the Constitution requires a 1:1 ratio in almost all cases with substantial compensatory damage awards, it is apparent that courts across the country either do not understand this or are acting in disregard of constitutional requirements. In either event, it is apparent that this Court needs to clarify the relationship among the three *Gore* guideposts, so that subjective assessments of reprehensibility are not permitted to trump the ratio guidepost entirely, and to

elucidate the proper application of the ratios set out in *State Farm*.[10]

D. Geographic and Jurisdictional Variability in Application of the Ratio Guidepost Adversely Affects the Quality of Justice

The problem of inconsistency in use of the ratio guidepost is worse in some courts and jurisdictions than others. A similar case involving similar parties in two different parts of the country can result in starkly different punitive damages awards depending on the approach of the reviewing courts. While some appellate courts have taken to heart the *State Farm* ratio of 1:1 in cases involving substantial compensatory damages, others view 4:1 as a starting point, and some courts take the *laissez-faire* view that as long as the ratio is in single digits, due process is assured.

For example, in *Bains LLC v. Arco Products Co.*, 405 F.3d 764 (9th Cir. 2005), the Ninth Circuit mentioned the putative 1:1 ratio established by *State Farm* only in passing, despite finding that the compensatory damages of $50,000 were substantial. *Bains* involved claims for breach of contract and violation of § 1981 brought by a trucking company that alleged it suffered economic damages as a result of discrimination. Explaining that this was not the

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[10] In a recent study of punitive damages awards exceeding $100 million, the authors concluded that, "If strictly applied, limiting the ratio of punitive damages to compensatory damages to 1:1 would eliminate about two-thirds of the cases from the $100 million blockbuster category." Alison F. Del Rossi and W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damages Awards*, 12 Am. L. & Econ. Rev. 116, 155 (2010).

rare case that would justify punitive damages in excess of a single-digit ratio, the court ruled that the "controlling Supreme court authority . . . implies a punitive damages ceiling in this case of, at most, $450,000 (nine times the compensatory damages)." *Id.* at 776.

Other Ninth Circuit cases similarly take 4:1 or higher as the appropriate starting point in the analysis. In *Zhang,* another § 1981 race discrimination case, the court affirmed a 7:1 ratio, saying, "We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case." 339 F.3d at 1044. *See also Hangarter,* 373 F.3d at 1014 (rejecting defendant's argument that punitive damages should not exceed a 1:1 ratio because *State Farm*'s ruling is "not binding, no matter how factually similar the cases may be").

Some state appellate courts have similarly explored only the upper boundaries of the *State Farm* ratios while ignoring the lower ones. In *Seltzer*, the Montana Supreme Court rejected the notion that "a 9:1 ratio is in almost all cases the constitutional limit." 154 P.3d at 611. Citing *Hangarter*, the court said, "[T]he Ninth Circuit Court of Appeals has recognized that *Campbell*'s reference to a 1:1 ratio does not establish a categorical rule in favor of a 1:1 ratio where compensatory damages are substantial." *Id.* at 612. The Montana court held that a ratio of 18:1 complies with *State Farm*'s ruling because it does not exceed single digits "to a significant degree." *Id.*; *see also Gober*, 137 Cal.App.4th at 222 (affirming 6:1 ratio in case involving substantial compensatory damages and "a modest degree of reprehensibility").

In *Flax*, the Supreme Court of Tennessee, in a case involving an alleged design defect in a seat back, found that an award of $2.5 million is not "so large as to require a ratio of 1:1." 272 S.W.3d at 539. Nor did the *Flax* court think that it needed to adhere to a ratio of 4:1. *Id.* at 540. *Flax* is also notable because the court expressed confusion about the relationship among the three guideposts. Noting that the third guidepost "seems to compel a dramatically different conclusion" than the other two—*i.e.*, a much lower punitive damages award—the court confessed it was "unfortunately left with little guidance as to how to resolve this discrepancy because both *Gore* and *Campbell* are cases in which all of the guideposts suggest the same result." *Id.* Accordingly, it simply ignored the discrepant third guidepost and approved a 5:35.1 ratio.

The picture that emerges is one of confusion, both for the courts who have to apply the guideposts and for litigants who need to understand their potential liability if punitive damages are imposed. Faced with uncertainty, it appears many courts have concluded that the constitutionally "safe" course is to approve punitive damages awards with a 9:1 or lower ratio, regardless of the degree of reprehensibility or whether the compensatory damages are substantial. If this Court takes only the most outrageous or shocking cases, it leaves the lower courts free to run roughshod over the Court's dictates that 1:1, or at most 4:1, is at the outer limits of due process requirements. The Court should grant review in order to put teeth into the ruling that a 1:1 ratio is the outer limit of due process in a case with substantial compensatory damages, that all the guideposts must align for a punitive damages award in excess of

1:1, and that it is the exceedingly rare case that would justify a ratio in excess of 4:1.

II. THE PROBLEM OF UNPREDICTABLE APPLICATION OF THE GUIDEPOSTS IS COMPOUNDED BY INCONSISTENT DEFINITIONS OF "COMPENSATORY" DAMAGES

Due process limitations are required to lend predictability to the amount of punitive damages that may be awarded in a given case. Facing litigation, a defendant can arguably apply the reprehensibility factors to its own conduct to assess the likelihood that reprehensibility will be found and to what extent. Similarly, potential compensatory damages can be estimated. If a consistent, or, at least, predictable, ratio were applied between punitive and actual damages, the defendant would have a reasonably good sense of the outer limits of its exposure in any given case. However, there is no consistency or predictability to the ratios, which is problem enough. When combined with fluid concepts of what can be included in the definition of "compensatory" damages, the problem is magnified to the point of unconstitutionality.

A ratio is only useful if the defendant can predict the likely numerator and denominator. Not only is such predictability sorely lacking at the beginning of a case, but the fact that, after the jury's verdict, the same set of facts can be manipulated to support a variety of different ratios reveals that the guidelines are, indeed, illusory and insubstantial. Here, the inclusion of pre-judgment interest as part of the compensatory award inflated the actual damages of $750,000 to a whopping $13.2 million after application of the 12% interest rate evidently intended by

the legislature as penal. This resulted in what would have been a ratio of 86:1 being reduced to only 4:1, a result the Oklahoma court found in its cursory fashion to pass constitutional muster. In doing so, the court did not even give lip service to any reason for its departure from the 1:1 *State Farm* ratio for cases involving substantial compensatory damages.

The inclusion of pre-judgment interest is only one example of the types of "add-ons" used by some courts to deflate the ratio from one that seems excessive to one that is at least facially constitutional. These range from attorneys' fees to statutory penalties to cases in which emotional distress is a component of the compensatory award. *See, e.g., Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3d Cir. 2005) (attorneys' fees); *Modern Management Co. v. Wilson*, 997 A.2d 37 (D.C. 2010) (statutory treble damages); *Roby v. McKesson Corp.*, 101 Cal. Rptr. 3d 773 (Cal. Ct. App. 2010) (emotional distress partially punitive). As in this case, other courts have included as "compensatory" elements of damages that far exceed the actual harm caused to the plaintiff, resulting in unconstitutional punitive damages awards. This Court should grant *certiorari* to rectify the injustice done to Petitioners and to provide clear guidance to other courts regarding the proper components of "compensatory" damages for purposes of the due process ratios.

III. PRODUCT MANUFACTURERS ARE ADVERSELY AFFECTED BY UNPREDICTABLE AND ARBITRARY PUNITIVE DAMAGES AWARDS

Product manufacturers are among the defendants who are often adversely affected by unpredictable and grossly excessive punitive damages awards. It is

not difficult to see why, as the elements of reprehensibility—"the most important indicium of the reasonableness of a punitive damages award"[11]—are present in many product liability cases. These cases often involve physical, as opposed to economic harm. Design defect cases always involve intentional decisions regarding costs and benefits of the product's design, and manufacturers are thus more likely to be considered to be in reckless disregard of health or safety. *See, e.g.*, David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 24-26 (1982) ("[A] manufacturer's choices involving necessary safety trade-offs and statistically inevitable risks always can be viewed in a sense as intentional wrongs to consumers hurt by such products. . . ."). The defendant is often a large corporation (likely from another state) while the plaintiff is an injured individual (sometimes a child or elderly person), who is by definition more vulnerable, both financially and otherwise. The design decisions at issue affect millions of identical products, so juries are often aware of other similar incidents and injuries, making the conduct seem even more reprehensible. *Id.* at 28-30. And juries are subject to hindsight bias, which comes into play in cases involving cost-benefit analysis with disturbing frequency. *See, e.g.*, W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547, 563 (2000) ("Instead of comparing expected benefits and costs, jurors may compare the enormous cost to the victim with the relatively negligible cost of the safety improvement.")

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[11] *Gore*, 517 U.S. at 575.

Since, in practice, the reprehensibility guidepost trumps the ratio guidepost, product manufacturers are likely to be inordinately affected by grossly excessive punitive damages awards. In a recent study of so-called "blockbuster" punitive damages awards (those of $100 million or more) issued since 1985, the authors concluded that a disproportionate number of such awards involved the automobile, cigarette, pharmaceutical/health care and energy/chemical industries. Alison F. Del Rossi and W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damages Awards*, 12 Am. L. & Econ. Rev. 116, 126 & Table 2 (2010). The mean ratio of punitive to compensatory damages ranged from 19:1 for the automobile industry to 11,125:1 for the cigarette industry. *Id.*[12]

The effect of such disproportionality directed at product manufacturers strikes at the heart of our economy. The threat of unlimited liability results in higher prices for consumer goods, less innovation and self-imposed restrictions on the products that are developed and brought to market. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO/AIMD-95, MEDICAL LIABILITY: IMPACT ON HOSPITAL AND PHYSICIAN COSTS EXTENDS BEYOND INSURANCE 16 (1995) ("Manufacturers pass on their liability costs to hospitals and physicians in their products' prices."); Richard L. Manning, *Changing Rules in Tort Law and the Market for Childhood Vaccines*, 37 J.L. & Econ. 247, 273 (1994) ("liability costs have caused dramatic increases in vaccine prices").

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[12] The latter ratio is even more alarming than it appears, because a Florida jury's $145 billion punitive damages award in a tobacco class action was excluded. *Id.*

In addition, the inability to predict and manage liability risks has a tendency to force settlements because proceeding to trial is simply too dangerous. Much has been written about the decline of the jury trial, particularly in federal courts. *See, e.g.*, Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255 (2005); Hon. Sam Sparks and George Butts, *Disappearing Juries and Jury Verdicts*, 39 Tex. Tech L. Rev. 289 (2007). Certainly, one factor that has influenced this trend is the threat of large punitive damages awards. *See, e.g.*, Royal Furgeson, *Civil Jury Trials R.I.P.? Can it Actually Happen in America?*, 40 St. Mary's L.J. 795, at 861 (2009) ("One of the major criticisms of juries is the unpredictability of their decisions on punitive damages.") If defendants are unwilling to try cases because of the risk of runaway punitive damages awards, jury trials will continue to die a slow death, and our system of justice will be further eroded.

CONCLUSION

As in *Gore*, "a review of this case would help to illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages." 517 U.S. at 568 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994)). The Court should grant the petition for a writ of *certiorari* in order to clarify the limits on punitive damages awards imposed by due process, to establish the proper relationship among the *Gore* guideposts, and to end continuing uncertainty about the proper components of "compensatory" damages.

Respectfully submitted,

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APPENDIX

APPENDIX A

Corporate Members of the
Product Liability Advisory Council, Inc
as of 11/9/2010

Total: 100

3M

Altec Industries

Altria Client Services Inc.

Anheuser-Busch Companies

Arai Helmet, Ltd.

Astec Industries

Bayer Corporation

Beretta U.S.A Corp.

BIC Corporation

Biro Manufacturing Company, Inc.

BMW of North America, LLC

Boeing Company

Bombardier Recreational Products

BP America Inc.

Bridgestone Americas Holding, Inc.

Brown-Forman Corporation

Caterpillar Inc.

Chrysler Group LLC

Continental Tire the Americas LLC

Cooper Tire and Rubber Company

Crown Equipment Corporation

Daimler Trucks North America LLC

The Dow Chemical Company

E.I. duPont de Nemours and Company

Eli Lilly and Company

Emerson Electric Co.

Engineered Controls International, Inc.

Environmental Solutions Group

Estee Lauder Companies

Exxon Mobil Corporation

Ford Motor Company

General Electric Company

General Motors Corporation

GlaxoSmithKline

The Goodyear Tire & Rubber Company

Great Dane Limited Partnership

Harley-Davidson Motor Company

Hawker Beechcraft Corporation

Honda North America, Inc.

Hyundai Motor America

Illinois Tool Works, Inc.

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Jaguar Land Rover North America, LLC

Jarden Corporation

Johnson & Johnson

Johnson Controls, Inc.

Joy Global Inc., Joy Mining Machinery

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kolcraft Enterprises, Inc.

Kraft Foods North America, Inc.

Leviton Manufacturing Co., Inc

Lincoln Electric Company

Magna International Inc.

Marucci Sports, L.L.C.

Mazak Corporation

Mazda (North America), Inc.

Medtronic, Inc.

Merck & Co., Inc.

Michelin North America, Inc.

Microsoft Corporation

Mitsubishi Motors North America, Inc.

Mueller Water Product

Niro Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

PACCAR Inc.

Panasonic

Pella Corporation

Pfizer Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

Remington Arms Company, Inc.

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Segway Inc.

Shell Oil Company

The Sherwin-Williams Company

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Stanley Black & Decker, Inc.

Subaru of America, Inc.

Synthes (U.S.A.)

Techtronic Industries North America, Inc.

Terex Corporation

TK Holdings Inc.

The Toro Company

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation

Zimmer, Inc.